Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

ALBERT J. AVENAL, JR., et al.,
Petitioners,

– against –

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the taking, through State action, of a property interest premised on a leasehold interest granted by the State for use of State land is properly assessed through: 1) this Court's traditional physical taking analysis, or 2) this Court's regulatory taking analysis, or 3) whether this Court should articulate a new hybrid analysis.

2. Whether, if a regulatory taking analysis is appropriate, the State can override its obligation to pay just compensation under the Fifth Amendment by expanding its "police power" and the "background principles" of the State's "law of property and nuisance."

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the parties to the proceeding below are: Albert J. Avenal, Jr., Anthony Barthelemy, Chris P. Barthelemy, Gary Barthelemy, Anna Butscher Buras, Anna Bessie Bodden Buras, Neal Buras, Ralph J. Buras, Ralph J. Buras, Jr., Richard Buras, Donald J. Campo, Jr., Donald P. Campo, Ernest Campo, Mathilda Guerra Campo, Estate of Tony Campo, Anna Cibilich, Pero Cibilich, Richard H. Clark, Crescent Oysters, Inc., Irvin Cross, Estate of Joseph Cross, Melvin Cross, Clarence R. Duplessis, Clarence R. Duplessis, Jr., Arthur Encalade, Carliss J. Encalade, Estate of Joseph Encalade, Stanley Encalade, Encalade Seafood, Inc., M.J. Farac, M.J. Farac, Jr., Maja Farac, Sinajka Farac, Ann P. Fox, Calvin R. Fox, Calvin R. Fox, Jr., Dale E. Fox, Gene L. Fox, Justin Ryan Fox, Kenneth A. Fox, Kenneth Ryan Fox, Marie O. Fox, Rachel Fox, Rhonda Fox, Rodney Fox, Jr., Rodney L. Fox, Ross Louis Fox, Fox Industries, Fox Oyster Co., Inc., Fox Seafoods, Inc., Estate of M.J. Franicevich, Estate of Frank Ganier, Abraham J. Harness, Nathan G. Harvey, Laurie A. Duplessis Holiday, Herman Isadore, Jr., J & P Oysters, Inc., Estate of Mayo P. Jones, Jr., Robert M. Keenan, Donald J. Kennair, Jr., Joseph Labruzzo, Arthur L. Lafrance, Joey G. Latapie, Clifford Lebouef, Jean Lebouef, Lindy Lebouef, Lorne Lebouef, Ante Lepetich, Mato Lepetich, John Martinez, Mederic R. Meyer, Matthew David Meyers, Mitchel Meyers, Cladmon Narcisse, Felix Narcisse, Oliver B. Narcisse, Nicolae Nitica, Richard Patterson, Pean, Inc., Ivo N. Popich, Anton N. Popich, Arthur A. Reddick, Adam R. Serigne, Lionel R. Serigne, O'Niel N. Serigne, Phillip H. Simmons, Helen T. Skansi, Nick L. Skansi, Frank Slavich, Jr., Taco, Inc., Ann S. Tesvich, Frances Lynn Tesvich, Ivo A. Tesvich, John A. Tesvich, Kuzma I. Tesvich, Jr., Estate of Kuzma J. Tesvich, Lisa K. Tesvich, Maria Tesvich, Nedo Tesvich, Peter J. Tesvich, Peter L. Tesvich, Tesvich Oysters, Inc., Charlie Thompson, Steve Thompson, Joseph Tinson, and Nikola Ante Vekic.

The class action representatives, Albert Avenal, Jr., Clarence Duplessis, Kenneth Fox, Fox Oyster Company and Nick Skansi were appellants in the proceedings before the Louisiana Supreme Court.

There are no parent or publicly held corporations owning 10% or more of the stock of any named corporate party.

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OPINIONS BELOW

The opinion of the Louisiana Supreme Court is reported at 886 So.2d 1085 (La. 2004), and is set forth at App. 1. The order denying petitioner's petition for rehearing and rehearing en banc is set forth at App. 64.

JURISDICTION

The opinion of the Louisiana Supreme Court was entered on October 19, 2004. (App. 1) Petitioner's timely filed petition for rehearing and for rehearing en banc was denied on December 10, 2004. (App. 64) This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> * * * nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This Petition raises two important constitutional questions stemming from the State of Louisiana's elimination of petitioners' leasehold property interests in the water bottoms of Breton Sound Basin, Louisiana. The petitioners in this action are Louisiana oystermen who held unexpired leasehold interests in certain underwater acreage of Breton Sound, which gave them exclusive use of those water bottoms to cultivate and harvest oysters, with a statutory right of renewal so long as the leases were capable of supporting oyster populations. The functional use of petitioners' leaseholds has been eliminated by State action.

In March, 1994, petitioners filed a class action suit against the State of Louisiana asserting the destruction of their property and seeking the value of their oyster leases as a result of the intrusion of fresh water from the State's freshwater diversion project, which diluted the salinity levels in Breton Sound below that level capable of sustaining oyster production. That action asserted a taking in violation of both the State and Federal constitutions. The jury found in favor of petitioners and awarded damages. On October 19, 2004, the Louisiana Supreme Court reversed, expressly rejecting petitioners' claims of a Fifth Amendment taking that warranted compensation. (App. 45-47) On December 10, 2004, that court denied the timely filed petition for rehearing. (App. 64)

This Petition addresses two issues arising from this Court's bifurcated approach to claims of a compensable taking under the Fifth Amendment's Just Compensation Clause. The first is whether the taking, through State action, of a property interest premised on a leasehold interest granted by the State for use of State land is properly assessed through: 1) this Court's traditional physical takings analysis, or 2) this Court's regulatory taking analysis, or 3) whether this Court should articulate a new hybrid analysis. Second, it raises the question whether, if a regulatory taking analysis is appropriate, can the State, by expanding its "police power" and the "background principles" of the State's "law of property and nuisance," override its obligation to pay just compensation under the Fifth Amendment.

In this case, petitioners entered into long-term leases with the State of Louisiana that granted them the exclusive right to use the water bottoms to cultivate and operate oyster beds in Breton Sound. The property rights of an oyster lessee are defined by State statute as having "exclusive use of the water bottoms leased and of all oysters and cultch grown or placed

thereon. . . ." La. R.S. 56:423(A).[1] Further, the State was under a statutory obligation to renew the oyster farmers' leases, provided the leases were "capable of supporting oyster populations." La. R.S. 56:428(A). Once they obtained the leases, some of which dated back to the early 1900's, petitioners expended significant effort and capital to maintain, improve and cultivate the oyster beds.

In an abrupt change in policy, in or about September, 1991, the State began to operate the Caernarvon Freshwater Diversion Structure ("Caernarvon") as part of the State's efforts to promote coastal restoration and wetland protection. Because the Caernarvon operation diverted fresh water from the Mississippi River into Breton Sound, the area containing petitioners' oyster beds was heavily infused with fresh water, and the salinity levels of Breton Sound were drastically diluted, rendering petitioners' leasehold areas too fresh for oyster cultivation.

In 1994, petitioners brought a class action suit against the State of Louisiana seeking compensation for the elimination of the value of their oyster leases as a result of the intrusion of fresh water from the State's operation of the Caernarvon project. After an eight-day trial, the jury's verdict in favor of the class representatives found that "the state has taken actions which have taken or damaged [the petitioners'] right to property." (App. 17-18) It awarded damages which resulted in a judgment of $21,345.00 per acre of oyster growing water bottoms. Thereafter, the Louisiana Supreme Court reversed, and rejected petitioners' claims that the State's action constituted a compensable taking under the Fifth Amendment. (App. 1, 45-47)

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[1] "Cultch" is the material laid down on oyster grounds to furnish a point of attachment for young oysters.

On appeal, petitioners argued that the State's destruction of the value of the leases by the diversion of fresh water into Breton Sound was a compensable taking under the Fifth Amendment. The Louisiana Supreme Court disagreed, deeming the State's action in flooding Breton Sound with fresh water a regulatory taking, and applying the three-part test set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). The Louisiana Supreme Court concluded that petitioners were aware of plans for the Caernarvon project, and determined that they could not have held "reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments." (App. 45) On rehearing, petitioners challenged that finding as not supported by the record.

The Louisiana Supreme Court also held that even if the State's actions herein deprived petitioners of all economically beneficial and productive use of their property, under a regulatory taking analysis, because Louisiana was applying its police power and acting in accordance with "a background principle of [Louisiana]'s property law," no compensation need be paid. (App. 46)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT OVER HOW TO ASSESS THE DESTRUCTION OF THE VALUE OF PROPERTY HELD UNDER A LEASE UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The first question posed by this Petition is whether, under the Just Compensation Clause of the Fifth Amendment, petitioners are entitled to compensation for the value of their leasehold interests, whose functional use was eliminated as a

result of the State of Louisiana's operation of the Caernarvon Freshwater Diversion Structure.

Under a long line of this Court's cases addressing physical takings, the answer to this question is a resounding yes. According to the Louisiana Supreme Court, which applied a second line of this Court's cases responding to regulatory takings, the answer is no. This Court should grant certiorari to reconcile these two lines of cases and to establish which body of law applies to the simple and recurring problem raised by this case.

As the fluidity of the real estate market encourages and compels the development of non-traditional, sectionalized property holding and use arrangements, the question of how such holdings should be treated when they are taken by State action is a real and present question. Because this Court's jurisprudence developed along the distinction as to *how* the property came to be taken – i.e., physical takings versus regulatory limitations – takings of property interests that do not fit cleanly into these two categories receive disparate treatment, depending on how the State action is characterized. This Court should resolve the open question of whether compensation is due a leaseholder whose property interest is stripped of any functional use by State action.

A. Physical Taking Cases

Petitioners' claims of compensation are virtually identical to those raised and decided in Alamo Land & Cattle Co., Inc., v. Arizona, 424 U.S. 295 (1976). There, the State of Arizona leased certain lands to petitioner Alamo; under the parties' ten-year lease, petitioner was permitted to use the lands solely for grazing in connection with its cattle ranch. 424 U.S. at 298-99. After the federal government claimed the land in connection with the establishment of a flood control dam and reservoir, the district court awarded Alamo monies for its "leasehold interest at the time of taking, and its reasonable prospective leasehold

interest." Id. at 300. In upholding the award of compensation, this Court acknowledged the long-standing rule that a leaseholder is entitled to compensation after a taking:

> [T]he holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.

Alamo, 424 U.S. 295 at 303. Because it was unclear whether Arizona had authority to grant the lease in the first instance, the Court remanded for such factual determinations under the specific terms of state law and the applicable leases.

Alamo is virtually indistinguishable from the present case, also involving an unexpired leasehold interest granting a right to a particular use of the land's surface, and where, similarly, the functional use of the property interest was eliminated through State action. Accordingly, pursuant to Alamo, when the State eliminated the functional use of petitioners' leasehold interests in the water bottoms, it became obligated to pay compensation.

Moreover, that reasoning is consistent with this Court's traditional jurisprudence that deems a compensable taking to have occurred where the government appropriates private property for public use – as opposed to imposing a limitation on use through regulatory control. The Court recently reiterated that standard:

> When the government physically takes possession of an interest in property for some public purpose,

> it has a categorical duty to compensate the former owner, United States v. Pewee Coal Co., 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); or when its planes use private airspace to approach a government airport, United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), it is required to pay for that share no matter how small.

Tahoe-Sierra Preserv. v. Tahoe Reg. Planning, 535 U.S. 302, 322 (2002). In United States v. Pewee Coal Co., 341 U.S. 114 (1951), the Court found that petitioner, a coal mine operator, was entitled to just compensation when the government took over

operation of coal mines on his leased land. Compensation for the physical taking of a leasehold interest was also awarded in United States v. General Motors Corp., 323 U.S. 373 (1945), where petitioner corporation owned a 20-year lease on a warehouse building in Chicago that was occupied for a period of time by the government under the Second War Powers Act, and in United States v. Petty Motor Co., 327 U.S. 372 (1946), where tenants were displaced by the government when it took over a building in Salt Lake City under the same War Powers Act.

Thus, where the government physically takes possession of the property interest, there is no inquiry into whether the appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use; as a categorical rule, it must pay for that share, no matter how small. Tahoe, 535 U.S. at 322-23.

Finally, this Court has recognized that destruction of property is equivalent to a physical occupation. In General Motors Corp., supra, where the lessee had customized the warehouse space to fit its manufacturing needs and those customized fixtures were removed or destroyed by the government in the course of its use, the Court deemed the lessee's interest in those fixtures to be as much "property" as its interest in the land, and held that the government's destruction of those customized fixtures constituted an additional loss of a compensable interest:

> For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon

> erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking.

General Motors, 323 U.S. 373 at 383-84. (Emphasis supplied.) Just as the government was obligated to compensate General Motors for the destruction of its trade fixtures in the course of the government's occupation of that leased property, so too it should bear the obligation to compensate petitioners for the oyster beds they developed on the leased water bottoms that were destroyed by the government in the course of its operation of the freshwater diversion structure.

B. Regulatory Taking Cases

This Court has also recognized that a compensable Fifth Amendment taking can occur through enactment of regulations that impose limitations on private use of property; in those cases, the takings analysis is structured along an entirely different framework. Having "generally eschewed" a set formula, the Court instead relies on ad hoc, factual inquiries, guided by multiple factors: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). See also Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (regulation prohibiting construction on salt marshes affected petitioner's property but even after regulation, petitioner retained significant value; remand for application of Penn Central analysis); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

Although the State of Louisiana's action in diverting the Mississippi's freshwater stream into Breton Sound – to achieve

a public benefit whose burden was improperly shouldered by the petitioners alone – bore all the hallmarks of a physical taking like that in Alamo, the Louisiana Supreme Court relied on this Court's line of regulatory takings cases to reach the opposite conclusion: that petitioners had no right to compensation. In effect, the Louisiana Supreme Court read Penn Central/Palazzolo/Lucas as overruling Pewee/General Motors/Alamo. The Court should grant certiorari to clarify whether the Louisiana Supreme Court is correctly reading this Court's precedents.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS WHETHER ITS PRECEDENTS ALLOW A STATE TO EXPAND ITS READING OF ITS POLICE POWERS AND/OR THE "BACKGROUND PRINCIPLES" OF THE STATE'S "LAW OF PROPERTY AND NUISANCE" TO CIRCUMVENT THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The regulatory cases recognize two exceptions to the three-step Penn Central analysis: those situations where the regulation involves a "permanent physical occupation" of property, see, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982) (government appropriated part of a rooftop in order to provide cable TV access for apartment tenants; Court held that a taking occurs where the "character of governmental action" is a permanent physical occupation); and where a regulation denies all economically beneficial or productive use of land. See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (Fifth Amendment is violated where a land-use regulation "denies an owner economically viable use of his land."); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992) (recognizing two exceptions). Those exceptions should theoretically make it unnecessary to decide whether the Fifth Amendment mandates compensation here because the leasehold terminations involved should be characterized as

physical takings, or because they should be considered regulatory takings subject to analysis under one of the exceptions.

The Louisiana Supreme Court recognized the holding in Lucas as to the principles underlying the exceptions. However, it opined that Lucas was inapplicable to the petitioners' claims because, it found, Lucas recognizes an exemption from the "just compensation" requirement where the State action is "undertaken in the exercise of the state's police power," or "in accordance with a 'background principle' of the State's property law." (App. 46). The court found that Louisiana's operation of Caernarvon fit under both exemptions, deeming it both "a valid exercise of the state's police power under federal law," and activated in accordance with the background principles of Louisiana law. (App. 46-47).

That reading was wrong. Lucas did not hold that compensation is never required when a State regulation renders property economically useless, simply because the State claims to be exercising its police power. If that were the case, as the Lucas Court appreciated, there would almost never be a requirement of compensation. To the contrary, Lucas noted that compensation is not mandated when the State law protects against an actual nuisance (or "noxious" or "harmful" use of the property), or when the property owner's use was "not part of his title to begin with." 505 U.S. at 1026-27. Since neither of those limitations applied here, under Lucas, there was a taking requiring compensation.

In addition, the Louisiana Court completely misread Justice Scalia's reference to "the background principles of state law of property and nuisance" in the land-use regulation area. Id. at 1029. Notably, the Louisiana court omitted the "and nuisance" component of that reference, and thus relied improperly on an overly broad interpretation of the exception as Justice Scalia articulated it. Instead, in the proper context, the pertinent question is whether the property owner ever had the

right to use his land in the way he asserts is being taken away – for example, a landowner does not have the right to use his land noxiously, and therefore a regulation preventing noxious use is not compensable. Here, by contrast, there was no improper use of the property by the petitioners; rather, the State took away petitioners' legitimate right to use and occupy the leaseholders' interest in the property.

Certiorari should thus be granted to address whether a State can expansively read its "police power" or its "background principles of the State law of property and nuisance" so as to eviscerate the Fifth Amendment's Just Compensation requirements.

CONCLUSION

This Petition raises two important constitutional issues about which the law is in conflict. The Petition for a Writ of Certiorari should be granted.

March 1, 2005

Respectfully submitted,

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Supreme Court of Louisiana.

Albert J. **AVENAL,** Jr., et al.

v.

The STATE of Louisiana and The Department of Natural Resources.

No. 2003-C-3521.

Oct. 19, 2004.
Rehearing Denied Dec. 10, 2004.

Background: Oyster fishermen brought class action against Department of Natural Resources to recover for unconstitutional taking of oyster leases as result of coastal restoration project that diverted water from the Mississippi River and lowered salinity of water over oyster leases. The 25th Judicial District Court, Parish of Plaquemines, Division B, No. 38-266, William A. Roe, J., rendered judgment in favor of fishermen following jury trial. State appealed. The Court of Appeal, Armstrong, J., 858 So.2d 697, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Victory, J., held that:

(1) hold harmless and indemnity clauses in oyster leases precluded most claims;

(2) the clauses were valid and enforceable;

(3) the claims were subject to two-year prescriptive period applicable when private property is damaged for public purposes, not three-year prescriptive period applicable to takings; and

(4) the period began to run in year the project was completed and accepted.

Reversed.

Johnson, J., concurred in result.

Weimer, J., concurred and filed opinion.

West Headnotes

[1] Eminent Domain ⚿282

148k282 Most Cited Cases

Hold harmless and indemnity clauses in oyster leases precluded oyster fishermen's claims of unconstitutional taking as result of coastal restoration project that diverted water from the Mississippi River and lowered salinity of water over oyster leases; the clauses released the state from any liability to the fishermen due to the diversion project. U.S.C.A. Const.Amend. 5; LSA-Const. Art. 1, § 4.

[2] Navigable Waters ⚿2

270k2 Most Cited Cases

Implementation of the Caernarvon coastal diversion project that introduced freshwater from Mississippi River into coastal area fit within the public trust doctrine; the public resource at issue was state's coastline being lost at an alarming rate, the risks involved were not just environmental, but involved health, safety, and welfare since coastal erosion removed an important barrier between large populations and ever-threatening hurricanes and storms, and erosion could result in the loss of inhabited land and businesses that rely on the coastal region as a transportation infrastructure vital to the region's industry and commerce.

[3] Fish ⚿7(2)

176k7(2) Most Cited Cases

Hold harmless clauses that were inserted in oyster leases as early as 1989 to protect the state from liability for diversions of freshwater as part of coastal restoration project were valid and enforceable under the authority granted to the Department of Wildlife and Fisheries (DWF) by statute permitting the Secretary of DWF to make stipulations in the leases deemed necessary and proper to develop the oyster industry; no further legislative authority was needed to validate the indemnity clauses. LSA-R.S. 56:425, subd. C.

[4] Eminent Domain ⚿282

148k282 Most Cited Cases

Oyster fishermen alleging damage to or destruction of oyster leases in Breton Sound as result of Caernarvon coastal

restoration project and its diversion of freshwater from Mississippi River did not have valid takings or damage claims against state due to indemnity clauses in 1995 and later leases, even though they filed suit in 1994; the fishermen claimed taking of their rights under the 1995 and later leases, and they claimed that their leases were rendered permanently useless for commercial oyster production, which necessarily included the time period covered by these post-1995 clauses. U.S.C.A. Const.Amend. 5; LSA-Const. Art. 1, § 4.

[5] Eminent Domain 266

148k266 Most Cited Cases

An inverse condemnation action provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced. U.S.C.A. Const.Amend. 5; LSA-Const. Art. 1, § 4.

[6] Eminent Domain 266

148k266 Most Cited Cases

Inverse condemnation claims derive from the Takings Clauses in state and federal constitutions. U.S.C.A. Const.Amend. 5; LSA-Const. Art. 1, § 4.

[7] Eminent Domain 266

148k266 Most Cited Cases

The action for inverse condemnation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal. U.S.C.A. Const.Amend. 5; LSA-Const. Art. 1, § 4.

[8] Eminent Domain 266

148k266 Most Cited Cases

The constitutional command of Takings Clause in state constitution is self-executing, such that the cause of action arises whenever a state commits a taking without justly compensating the victim. LSA-Const. Art. 1, § 4.

[9] Eminent Domain 288(2)

148k288(2) Most Cited Cases

Inverse condemnation claims by oyster fishermen alleging loss

as result of coastal restoration project that diverted freshwater from the Mississippi River and lowered salinity of water over oyster leases were subject to two-year prescriptive period applicable when private property is damaged for public purposes, not three-year prescriptive period applicable to takings; the state owned the water bottoms, waters, and oysters and never guaranteed a commercially viable oyster lease, and the fishermen had a claim for damage only until leases expired since renewal leases would require fishermen to hold state harmless. LSA-Const. Art. 1, § 4; LSA-R.S. 9:1101, 9:5624, 13:5111, 56:3, 56:423.

[10] Eminent Domain 2.1

148k2.1 Most Cited Cases

Under federal law, when the government limits the use a property owner may make of his or her property, without itself occupying or otherwise using the property for government purposes, the three-part test for determining whether taking has occurred requires court to consider (1) the character of the governmental action, (2) the economic impact on the claimant, and (3) particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations. U.S.C.A. Const.Amend. 5.

[11] Eminent Domain 2.25

148k2.25 Most Cited Cases

Even if coastal restoration project that diverted freshwater from the Mississippi River and lowered salinity of water over oyster leases entirely deprived oyster fishermen of all economically beneficial and productive use of their property rights, they were still not entitled to compensation as the project was a valid exercise of the state's police power under federal law; the state has always had the right to disperse fresh water from the Mississippi River over saltwater marshes in order to prevent coastal erosion, and the project was a matter of actual necessity as it would forestall a grave threat to the lives and property of others. U.S.C.A. Const.Amend. 5; LSA-Const. Art. 1, § 4.

[12] Statutes 223.4

361k223.4 Most Cited Cases

When conflicting statutes are applicable, the one more specifically directed to the matter applies.

[13] Eminent Domain ⚷288(2)

148k288(2) Most Cited Cases

The purpose of two-year prescriptive period applicable when private property is damaged for public purposes is to limit the exposure of the state and its political subdivisions to liability in connection with a public work to a reasonable period of time. LSA-R.S. 9:5624.

[14] Eminent Domain ⚷288(2)

148k288(2) Most Cited Cases

Not every lawsuit for damages caused by a public entity or involving a public works project falls within the purview of two-year prescriptive period applicable when private property is damaged for public purposes; the damage must be incurred for public purposes. LSA-R.S. 9:5624.

[15] Eminent Domain ⚷288(2)

148k288(2) Most Cited Cases

Damage is incurred for public purposes, and, thus, the two-year prescriptive period applicable when private property is damaged for public purposes applies, when the damaging is intentional or occurs as a necessary consequence of the public undertaking; even unintentional damage can be inflicted for public purposes if it is a necessary consequence of the public project. LSA-R.S. 9:5624.

[16] Limitation of Actions ⚷55(5)

241k55(5) Most Cited Cases

Two-year prescriptive period applicable when private property is damaged for public purposes began to run on takings claims by oyster fishermen in year that coastal restoration project was completed and accepted and freshwater from Mississippi River began lowering salinity of water over oyster beds. LSA-R.S. 9:5624.

[17] Limitation of Actions ⚷55(6)

241k55(6) Most Cited Cases

Two-year prescriptive period applicable to any and all actions when private property is damaged for public purposes is not

subject to the continuing tort doctrine; thus, the period begins to run from the moment the first damage is actually sustained. LSA-R.S. 9:5624.

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****1** VICTORY, J. [FN*]

> FN* Retired Judge Thomas C. Wicker, Jr., sitting as Justice *ad hoc.* Associate Justice Chet D. Traylor, recused.

In this case, oyster fishermen holding oyster leases in the Breton Sound area claim they suffered a compensable taking under La. Const. Art. I, § 4 as a result of the State of Louisiana's operation

of the Caernarvon Freshwater Diversion Structure ("Caernarvon"), which altered salinity levels in the waters covering the oyster fishermen's leases. After a review of the record and the applicable law, we reverse the judgments of the lower courts and hold that the vast majority of the oyster fishermen are not entitled to compensation under La. Const. Art. I, § 4 because their leases contain clauses holding the State harmless from any loss or damage resulting from this coastal diversion project. Further, we hold that the claims of the oyster fishermen whose leases do not contain hold harmless clauses have prescribed under La. R.S. 9:5624.

FACTS AND PROCEDURAL HISTORY

Following the flood of 1927, the United States Army Corps of Engineers (the "Corps") expanded the Mississippi River levee system to confine the river to prevent further major floods. Before the levees were built, naturally occurring floods deposited **2 millions of tons of sediments into the marshlands, which allowed marshland and other grasses to grow; without those nutrient-rich sediments, the plants that hold surrounding soils in place disappear and the land turns to open water. In the last fifty years, hundreds of square miles of wetlands along the Louisiana coast have disappeared and scientists have estimated that between thirty-five and forty-five square miles of coastal wetlands are lost each year.

Another effect of the levee system was on the salinity of the water. The coastal waters of Louisiana have historically provided excellent conditions for oyster growth, because the freshwater from the Mississippi River and smaller coastal streams mix with the saltwater of the Gulf of Mexico, creating an ideal ecosystem for oyster cultivation. By keeping fresh water out of the wetlands that surrounded the Mississippi River in the Breton Sound Basin, the levees unexpectedly raised the salinity of the waters covering those wetlands and this change in salinity fostered new oyster growth in the landward region of the basin

that had previously been too fresh to sustain oyster growth. However, the changes in salinity that made some previously unproductive waters productive also ruined some oyster grounds that had been extremely productive before the levees were created.

These effects were recognized in the 1950s, and the state and federal governments began planning to divert freshwater from the Mississippi River into adjacent marshlands to address these problems. According to a 1959 memorandum issued by the U.S. Fish and Wildlife Service to the ***1089** Corps, certain man-made and natural causes, over time, had increased the salinity level of the sub-delta marshlands below New Orleans, thereby adversely affecting fish and wildlife, including oysters, waterfowl, and fur animals. This investigation was prompted, in part, by requests from local groups, including the oyster industry, which attended a public hearing in ****3** New Orleans on April 25, 1955, concerning the need for freshwater diversions. After finding "a marked reduction [in oyster yield] per unit area" over time, the U.S. Fish and Wildlife Service concluded in the 1959 memorandum that "[i]ntroduction of fresh water to reestablish natural patterns of salinity and alluviation and increase fertility would provide the most effective method of restoring fish and wildlife production." The 1959 memorandum identified four separate areas in Plaquemines Parish as freshwater diversion sites, two of which were located on the west side of the Mississippi, Areas No. 1 and 3, and two on the east side, Areas 2 and 4. The diversion structures were to be designed to benefit both public seed grounds [FN1] and privately held water-bottom leases obtained from the state for oyster leasing. Between 1968 and 1969, the Corps met with local interests, including the Louisiana Department of Wildlife and Fisheries ("DWF") and the Plaquemines Parish Commission Council, to discuss proposed locations for the diversion structures authorized by Congress. During Corps-sponsored public hearings held in 1968, the Corps

proposed Caernarvon as the situs of the freshwater diversion structure for Area No. 4 to be located on the east side of the Mississippi.

> FN1. Louisiana maintains considerable acreage devoted to public seed grounds. These public seed grounds tend to be farther offshore than the leased acreage. The public seed grounds are open for approximately seven months of the year (September to the following March). The public seed grounds provide a source of seed oysters that can be transplanted by lessees to their individual leases for harvest at a later date; the public grounds also contain market-sized oysters that can be harvested by anyone and marketed directly with no transplanting requirements.

The 1959 memorandum described the entire area covering Area 4 as "usually too fresh to support an oyster industry ..." The memorandum stated that the pollution resulting from Caernarvon's discharge of silt would "not be a problem in Area No. 4 as in other areas because an oyster fishery is not present." Thus, the 1959 memorandum confirmed that Area No. 4, where Caernarvon would alter salinity levels in the water, coincided with the area of Breton Sound Basin that had been shown to **4 be outside the productive oyster zone as of 1960.

During the 1970s, as land continued to erode and disappear further and further inshore, the zone favorable for oyster growth continued to move landward, due to saline changes. This landward salinity movement spawned an oyster community in the marshlands in the northwest portion of the Breton Sound Basin, which had previously been too fresh to sustain such growth. While creating new oyster grounds, the inland movement of salinity had the deleterious effect of rendering unusable large areas of previously productive oyster grounds, including the public seed grounds. Between 1978 and 1982, the Corps and relevant state and local agencies continued to discuss

the construction of a freshwater diversion structure at Caernarvon at informal meetings. On January 21, 1982, the State submitted a letter to the Corps, announcing its intent to participate in the Caernarvon project, and the Corps and the Louisiana Department of Natural Resources (the "DNR") issued a joint public notice about the project.

*1090 In 1984, the Corps prepared an environmental impact statement suggesting locations of large salinity concentrations (isohalines) at three areas along the southeast Louisiana coast to enhance fisheries and to combat coastal erosion. To create optimal salinity regimes, the environmental impact statement proposed the construction of three freshwater diversion structures in the three areas: (1) the Bonnet Carre Spillway in the Lake Ponchartrain Basin; (2) the Davis Pond Freshwater Diversion Structure in the Barataria Basin; and (3) the Caernarvon Freshwater Diversion Structure in the Breton Basin near Braithwaite, Louisiana. The Caernarvon project, in particular, was designed to abate saltwater intrusion and marine tidal invasion, while promoting coastal restoration and enhancing fisheries and wildlife in the basin. The DNR and DWF set optimal target salinity zones in Breton Sound, which ranged from 5 parts per thousand **5 "ppt") for the northwest inland area of the basin to 15 ppt for the lower seaward end of the basin. The salinity zones were based upon the fact that below 5 ppt, oysters become stressed and die, while above 15 ppt, oysters are subject to saltwater predators and disease. The optimal salinity regime targeting annual average isohalines in concentration between 5 ppt and 15 ppt allowed oyster propagation and cultivation to continue in an existing zone within Breton Sound, while at the same time fostered coastal restoration by freshening the upper Breton Basin and allowing vegetation to return in an area where little oyster production was occurring. The Corps' 1984 memo also recognized that "the zone where conditions will become too fresh for oyster cultivation as a result of the diversion coincides with an area that was historically (prior to 1960) too fresh and not favorable for oyster cultivation." At a July 31, 1984, public

hearing, the President of the Louisiana Oyster Dealers and Growers indicated his support for both the Caernarvon project and freshwater diversion structures generally.

On October 30, 1986, Congress authorized the funds for construction of Caernarvon, and the State entered into a formal cooperation agreement with the Corps on June 10, 1987. The agreement recognized Caernarvon as one of the four sites originally authorized by the Flood Control Act of 1965. In anticipation of the operation of Caernarvon, in 1989, DWF inserted a clause in its lease form, requiring that the State be indemnified and held harmless for any claims related to coastal restoration. [FN1a]

FN1a. This clause will be discussed in detail later in the opinion.

Also, in response to an October 26, 1990, letter from Bill Good, Ph.D., acting administrator of DNR's Coastal Restoration Division and chairman of the Caernarvon **6 Interagency Advisory Committee (the "CIAC"), [FN2] to the acting secretary of the DWF, that oyster leases within the Caernarvon structure's intended impact area might be adversely affected by the freshwater diversion flow, the DWF implemented an oyster "relay" operation. The relay, known as the Caernarvon Oyster Transfer, allowed oyster lessees with productive oyster leases, who obtained a relay permit and posted a $1,000.00 performance bond, to move their oysters from the potential Caernarvon impact area to predesignated lease sites outside the impact zone. [FN3] Some *1091 lessees chose to participate, while others did not.

FN2. The CIAC is the advisory group of agency representatives and stakeholders who, among other things, determine the flow rate of Caernarvon.

FN3. A memo issued by Greg Laiche of the DWF on November 7, 1990 explained that the effects Caernarvon might have on the oyster fishermen's leases were

unknown, but recognized that "certain fisheries resources could be displaced." He described the relay program as follows: In regards to assisting the state in any mitigative damages resulting from the operation of the structure, the Department is prepared to compensate oyster fishermen whose oyster leases are adversely affected by the operation of the structure, in five years, by the relocation of oyster leases out of the area on an acre for acre basis at that time. The lessee would have to document these damages to obtain a lease relocation. Any such relocations would be restricted to areas designated for leasing in the vicinity.

LDWF, along with DHH is allowing oyster lease holders, south of the Caernarvon Freshwater Diversion Structure out to the Tennessee Gas Pipeline (Double pipeline) an opportunity to relocate oysters which may be affected by the operation of the structure.

Oysters may be relocated from December 3-7 [1990] beginning one-half hour before sunrise and ending one-half hour after sunset except on December 7, when all relocation activity must cease at 12 noon. Applications for relocation permits must be filed ten days prior to December 3rd. The LDWF Enforcement Division will enforce the relocation as per the attached requirements and rules. LDWF biologist will also monitor the relocation in an effort to estimate production of the leases from which oysters are removed.

Construction commenced at the Caernarvon site on June 7, 1988, and was completed in February 1991. The official Caernarvon dedication was held on April 12, 1991. Caernarvon operates based on gravity and hydrostatic pressure from the river and consists of five culverts equipped with gates that can be raised or lowered to regulate the rate of flow from the river. Caernarvon was initially tested from an **7 operational standpoint in August 1991, but could not be operated in accordance with its intended flow regime at that time since the

entire Breton Sound area had been heavily impacted in early 1991 by heavy rains, resulting runoff, and the high river conditions which had overflowed the Mississippi's east bank directly into Breton Sound at the Bohemia Spillway. Caernarvon became operational in September of 1991 in accordance with the recommended flow rates, and this achieved some, but not all of the intended effects of the project. As a result, the CIAC eventually voted to significantly increase the flows of the Caernarvon project in 1993, resulting in a greater freshening of Breton Sound. While this greatly improved oyster production on the public seed grounds, [FN4] it reduced the salinity of the water covering the private oyster leases north of the public seed grounds and closer to the structure, where plaintiffs' leases are located. In 1996, the CIAC voted to decrease the flow to the original flow regime and has since monitored conditions, increasing or decreasing the flow in order to keep the annual average salinity within the 5ppt target area or isohaline (area of equal salinity concentration).

> FN4. In fact, oyster productivity on the public seed grounds increased by 300%, a fact acknowledged by plaintiffs in brief.

On March 29, 1994, plaintiffs filed the instant class action suit on behalf of all persons holding oyster leases on state-owned water bottoms in Breton Sound, asserting that their oyster leases were destroyed or damaged because of the intrusion of freshwater from the Mississippi River by the Caernarvon project. The plaintiffs' oyster leases are located in Breton Sound, east of Caernarvon and west of the public seed grounds; further east of the public seed grounds is the Gulf of Mexico. [FN5] There **8 are approximately 204 [FN6] *1092 oyster leases involved in this class action. Plaintiffs asserted that the State's action of lowering the salinity levels of the water in Breton Sound below that necessary to support oyster cultivation "has resulted in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in

[their] property rights without compensation in violation of Article I, § 4 of the Louisiana Constitution ..." Plaintiffs asserted that prior to the time Caernarvon went on line, the 5-15 ppt salinity range coexisted with their leases.

> FN5. On August 16, 1996, the trial court issued a judgment certifying a class with the following definition: All persons, corporations, or other legal entities who have held, or who now have ownership interests in oyster leases located in that part of Breton Sound west of the "red line" that is, that boundary or line established by the Louisiana Department of Wildlife and Fisheries designated in the western most limits of this State's oyster seed grounds; south of the Mississippi River Gulf Outlet and north of Kelly Gap.
> DNR appealed and applied for writs related to both the Reasons for Certification and the Judgment of certification, but writs were denied.

> FN6. The exact amount of oyster leases held by the named plaintiffs in this law suit is somewhat unclear. Plaintiffs produced the leases at trial in Exhibits 1-4, which, according to the record in this Court, amount to 202 leases. The court of appeal and the defendants have stated that there are 204 leases.

On April 24, 1994, plaintiffs also filed suit in the United States Court of Federal Claims against the United States, more particularly the Corps, which designed, financed, and built Caernarvon, alleging the same takings theories, but under the Fifth Amendment to the United States Constitution. The Court of Federal Claims granted the Corps' motion for summary judgment in August of 1995, concluding that plaintiffs had no compensable expectancy in the continued artificially elevated saline levels caused by the Mississippi River levee system in historically freshwater marsh areas within Breton Sound. *Avenal v. United States* 33 Fed. Cl. 778 (1995). The court of appeal

affirmed the decision on different grounds, [FN7] holding that the oyster lessees could not have had "reasonable investment-backed expectations" that their oyster leases **9 would give them rights protected from the planned freshwater diversions authorized by the federal and state *1093 governments. *Avenal v. United States*, 100 F.3d 933 (Fed.Cir.1996). [FN8]

FN7. The federal circuit court ruled in *Avenal* as follows:

The case before us presents a textbook example of a situation in which the plaintiffs, in the face of established public concerns and while governmental efforts to address those concerns were well known, moved to take advantage of the existing conditions for their own economic benefit. There is nothing wrong with their having done that; the State of Louisiana provided the mechanism for it, and their own initiative gave them whatever economic advantages the situation afforded. It is hard for them to claim surprise, however, that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage.

Though as entrepeneurs they are entitled to capitalize on the opportunities afforded by government action, they cannot here insist on a guarantee of non-interference by government when they well know or should have known that, in response to widely-shared public concerns, including concerns of the oystering industry itself, government actions were being planned and executed that would directly affect their new economic investments. These concerns and plans date back to the early part of the century, and beginning in the 1950's and 1960's were actively being pursued by state and federal agencies. They were certainly a part of the environment in which the raising and harvesting of oysters in the Louisiana marshes were conducted. Assuming, as we

must, that these plaintiffs did not invest in their leases until the 1970's, these plaintiffs, in the words of *Penn Central*, cannot have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments. *Avenal v. State, supra*, 100 F.3d at 937.

FN8. Following these decisions, the DNR filed a motion for summary judgment in this state action, alleging that collateral estoppel barred the relitigation of the "takings" issue already decided by the federal courts. The trial court denied the motion, and the court of appeal agreed, holding on rehearing that the legal standard applied in the federal case was not the same because "the 'distinct' investment-backed expectations" test of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is irrelevant to the question of whether a taking has occurred under Louisiana law. *Avenal v. State*, 99-0127 (La.3/15/00), 757 So.2d 1 (on rehearing). This Court denied writs. *Avenal v. State*, 00-1077 (La.6/23/00), 767 So.2d 41, *cert. denied, La. Dept. of Natural Resources v. Avenal*, 531 U.S. 1012, 121 S.Ct. 568, 148 L.Ed.2d 486 (2000).

On December 15, 1998 in the state court suit, plaintiffs moved to strike all evidence, testimony, and argument regarding the hold harmless clauses contained in the oyster lease agreements. The DNR filed a motion for partial summary judgment seeking the dismissal of many class members' claims based on the validity of the hold harmless clause inserted into every lease agreement issued from 1989 through 1995. The DNR also argued in its motion for summary judgment that the Coastal Wetlands Restoration Advisory clause and the Allocation of Risk and Liability and Indemnity clause, both of which were inserted into every oyster lease agreement issued as of **10 1996, also precluded the plaintiffs' from asserting their claims for damages

against the State. The trial court granted plaintiffs' motion in limine, excluding all evidence relating to the hold harmless provisions contained in plaintiffs' leases. The trial court deferred ruling on the DNR's motion for partial summary judgment as to the validity of the hold harmless clauses until "after the jury's findings." The DNR filed a writ application seeking review of these rulings, which the court of appeal denied in part and granted in part. *Avenal v. State,* 99-0317 (La.App. 4 Cir. 12/15/00). The court of appeal found no error in the trial court's grant of plaintiffs' motion in limine to exclude all evidence of the hold harmless provisions, but found that the trial court erred in deferring to rule on the motion for summary judgment and held that it had to either grant or deny the motion at least ten days before trial. *Id.* However, as this ruling from the court of appeal did not come until the final day of trial when the jury returned its verdict, the trial court never ruled on the motion for summary judgment regarding the validity of the hold harmless clauses.

Prior to trial, plaintiffs also filed a motion in limine to exclude all evidence and testimony regarding the biological assessments and side-scan sonar surveys that the DNR intended to use to prove the amount of reef on the individual plaintiffs' oyster leases. The trial court granted the motion. The trial court also refused to grant DNR's motion to compel production regarding the oyster lessees' actual income and production on their leases. [FN9]

> FN9. The named plaintiffs produced a limited amount of information regarding the actual amount of income earned from the sale of oysters on their leases before and after Caernarvon went online, but this information fell far short of establishing the amount of damages that would be necessary to prove actual damages in this case.

After an eight-day jury trial on the merits, the jury returned a verdict in favor of the five class representatives, finding that "the state has taken actions which have taken or damaged the

[plaintiffs'] right to property." The jury determined that $21,345.00 **11 per damaged acre [FN10] would adequately *1094 compensate plaintiffs Duplessis, Skansi, Fox, and Fox Oyster Company for their losses, while $1,000.00 per acre would adequately compensate Avenal. The trial court, in accordance with the jury's verdict, rendered judgment awarding Avenal $826,000.00; Duplessis $5,442,975.00; Fox $20,235,060.00; Fox Oyster Company $16,200,885.00; and Skansi $5,571,045.00. The court awarded the remaining class members similarly situated to Avenal and those similarly situated to the four other class representatives their respective damages, which included 63,000 acres of oyster leases resulting in an award of over $1,000,000,000.00. In addition to compensatory damages, the court awarded plaintiffs attorneys' fees and court costs. The trial court denied all post-trial motions. The DNR filed an application for supervisory writs seeking review of the trial court's denial of its motion for new trial and its refusal to abide by the court of appeal's December 15, 2000 ruling that the trial court either grant or deny the motion for partial summary judgment on the hold harmless clauses at least ten days prior to trial. The court of appeal declined to exercise its supervisory jurisdiction, ruling that the DNR's writ **12 application should be consolidated with its pending appeal. *Avenal v. State,* 01-0542 (La.App. 4 Cir. 5/22/01).

> FN10. This damage award was based on a formula, referred to as the "currency cultch matrix," which uses the cost of cultch (installed) as the currency for valuing oyster leases. "Cultch" is defined by Webster's Dictionary as "material laid down on oyster grounds to furnish point of attachment for young oysters." A layer of cultch on the water bottom is necessary for the growth of oysters. The currency cultch matrix looks to the costs of the cultch (installed) on a per acre basis. In the present case, the currency cultch matrix measured the value of plaintiffs' leases by the cost of replacing them at another location by the replacement of six inches of cultch on

every inch of plaintiffs' leases, even though there was no proof offered at trial that any of the leases ever contained six inches of cultch. The court of appeal appears to have justified this holding based on another coastal area affected by a coastal diversion, Davis Pond, where the State settled with the oyster lessees based on the currency cultch matrix formula. However, those oyster lessees were only compensated to the extent necessary to cover their leases in 1 1/2 inches of cultch. Further, the qualifying Davis Pond leases were all "active and productive," and only qualified for evaluation under the damage formula if they agreed to a side-scan sonar survey using an acoustic remote-sensing device to determine the amount of cultch, reef or hard bottom in each lease, the replacement of which was the only thing they would be compensated. Prior to trial in this case, the plaintiffs in this matter rejected a similar offer by the state.

While we do not reach the issue of the exorbitant amount of damages awarded by the lower courts in this opinion, this Court has held that, albeit in a tort case under La. R.S. 56:423, that an oyster lessee is not entitled to restoration or replacement costs, as the state being the owner of the property, and not the lessee, is the party with the real and actual interest in restoring or rebuilding the property. *Inabnet v. Exxon Corp.*, 93-0681 (La.9/6/94), 642 So.2d 1243, 1255.

A divided five-judge panel affirmed the trial court judgment. *Avenal v. State Dept. of Natural Resources*, 01-0843 (La.App. 4 Cir. 10/15/03), 858 So.2d 697. Although the plaintiffs did not prove at trial the amount of oyster production on their leases before and after Caernarvon, and some leaseholders admitted that their leases had never produced oysters, the court of appeal held that "so long as plaintiffs proved *generally* that their leases were productive before [Caernarvon] came on line, and that they were not productive after [Caernarvon] came on line, and that

[Caernarvon] caused the loss of oyster productivity ..." the plaintiffs were entitled to recover. *Id.* at 704 (emphasis added). In addition, the court of appeal increased the award to the lead plaintiff Avenal to over $17,000,000 because he is "a well-established oyster fisherman," and there was no proper basis for Avenal to be treated differently than the other plaintiffs, despite ***1095** the fact that he had acquired some of his leases at the same time the present suit was filed. *Id.* at 703, n. 4.

We granted the DNR's writ application to determine whether plaintiffs are entitled to compensation under La. Const. Art. I, § 4 as a result of the State's operation of Caernarvon, which altered salinity levels in the waters covering the oyster fishermen's leases. *Avenal v. State*, 03-3521 (La.1/30/04), 864 So.2d 638. [FN11]

> FN11. We have received numerous amicus briefs in this case from various parties, including, but not limited to, the Coalition to Restore Coastal Louisiana and Environmental Defense, the Business Council of New Orleans & the River Region, Inc., the Louisiana Department of Transportation and Development, the Police Jury Association of Louisiana, Inc., Professor Oliver Houck, the Louisiana Division of Administration, the City of New Orleans, Louisiana Department of Wildlife and Fisheries, the Slavik family, and the Fishermen and Concerned Citizens Association, Inc.

****13 DISCUSSION**

The Oyster Statutes

The leasing of state-owned water bottoms to private parties for the purpose of oyster farming is governed exclusively by a specific statutory scheme. According to this statutory scheme, the State owns "all oysters and other shellfish and parts thereof grown [on the State's water bottoms], either naturally or cultivated, and all oysters in the shells after they are caught and

taken therefrom ... except as provided in R.S. 56:4." [FN12] La. R.S. 56:3. Further, the State owns all water bottoms "bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the State," and the State may not alienate these water bottoms. La. R.S. 56:3; La. Const. art. VII, § 14 (2004); Art. IX, § 3 (2004). However, in order to foster, cultivate, and protect the Louisiana oyster industry, the State has statutorily authorized the issuance of oyster leases to private parties.

> FN12. La. R.S. 56:4 provides:
> Nothing in this Title and particularly in Section 3 of this Part affects in any way the authority of the Louisiana Department of Natural Resources to lease or otherwise administer the beds and bottoms of navigable rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state, as established by law and regulations and promulgated thereunder.

Accordingly, La. R.S. 41:1225 authorizes the DWF to grant leases on state-owned water bottoms for oyster cultivation, bedding, and harvesting, and matters relating thereto, as provided in Subpart D of Part VII of Chapter 1 of Title 56 of the Louisiana Revised States of 1950. La. R.S. 41:1225; La. R.S. 56:4. All oyster leases issued on State water bottoms are governed exclusively by this statutory scheme. La. R.S. 56:424. La. R.S. 56:425 provides that the Secretary of the DWF may only lease this State's water bottoms and natural reefs in the water bottoms of this State to a resident, a firm composed of residents, or a corporation domiciled in Louisiana or **14 organized under this State's laws. The Secretary's right to grant oyster leases is likewise contingent upon a determination that the State owns the water bottoms to be leased, and that the lessee agrees as a matter of contract that he will operate under Louisiana laws and pursuant to DWF's rules and regulations. La. R.S. 56:425(A), (B). All leases begin on the date the lease is signed and continue

for a fifteen-year period. La. R.S. 56:428(A). La. R.S. 56:425(C) recognizes that the Secretary may "make such stipulations in the leases made by him as he deems necessary and proper to develop the [oyster] industry" provided that the clauses are consistent ***1096** with the statutory provisions of Subpart D.

The property rights of an oyster lessee are defined in La. R.S. 56:423 as follows:

> A. A lessee shall enjoy the exclusive use of the water bottoms leased and of all oysters and cultch grown or placed thereon, subject to the restrictions and regulations of this subpart.
>
> B. (1) A lessee of oyster beds or grounds who has obtained, recorded and marked his lease in compliance with the law shall have the right to maintain an action for damages against any person, partnership, corporation or other entity causing wrongful or negligent injury or damage to the beds or grounds under lease to such lessee.
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> * * *
>
> (3) Any action for damages under this Section shall be brought within one year of the occurrence of the wrongful or negligent act, or within one year of the date of discovery of such act, whichever last occurs.

In exchange for this exclusive use of state resources, a lessee pays the State two dollars per acre for plots up to 2,500 acres (formerly 1,000 acres). La. R.S. 56:423(A); La. R.S. 56:432 (2003); Act 449 of 2003. The leaseholder can unilaterally terminate his lease at any time by notice or by simply ceasing rental payments. If the DWF unilaterally terminates a lease and takes it back to create new seed grounds, DWF must compensate the leaseholder but only for "oysters, seed oysters, and other ****15** improvements." La. R.S. 56:434(B) (1991). La. R.S. 56:428(A) also allows the State to forego giving an oyster lessee the first right of renewal under his lease upon a determination that the lease is not capable of supporting oyster populations.

The Hold Harmless Clauses

[1] The vast majority of the leases in this case, except for 12 [FN13] of the approximately 204 leases alleged by the named plaintiffs to have been "taken" by Caernarvon, contain hold harmless clauses which legally and validly hold the State harmless from any damages suffered by the oyster fishermen by the operation of this coastal diversion project. As explained below, we hold that the these oyster fishermen's takings claims are precluded by virtue of these hold harmless clauses.

> FN13. Among the leases presented by the plaintiffs in Exhibits 1-4, 12 are dated prior to 1989 and do not contain hold harmless clauses. However, one of these leases, Lease No. 26236 included with the Avenal leases, was issued to Donald Campo, Sr., and there we can find no indication in the record that it was ever transferred to Avenal. In any event, when we refer to the leases dated prior to 1989, we will be referring to all 12 leases included in Exhibits 1-4.

In 1989, when DWF became concerned that Caernarvon would alter the salinity levels in the waters covering the oyster leases in Breton Sound, DNR objected to the issuance of oyster leases in Breton Sound or elsewhere in the vicinity of planned coastal restoration projects. However, a compromise was confected by then Chairman of the Louisiana Coastal Restoration Policy Committee, Manual Fernandez, to allow oyster leases to issue as long as they contained a hold harmless and indemnity clause in favor of the state. Thus, instead of not issuing any more leases on the basis that these leases would not be capable of supporting oyster populations under the authority of La. R.S. 56:428(A), DWF inserted a hold harmless clause into all leases issued after 1989, which cover 140 of the 204 leases in this case. It was only with this clause that the oyster leases were allowed to issue, which was solely for the benefit of the oyster ***1097** industry. This 1989 hold harmless clause stated:

> **16 This lessee hereby agrees to hold and save the State of Louisiana, its agents or employees, free and harmless from any claims for loss or damages to rights arising under this lease, from diversions of fresh water or sediment, depositing of dredged or other materials or any other actions, taken for the purpose of management, preservation, enhancement, creation or restoration of coastal wetlands, water bottoms or related renewable resources; said damages to include, but not to be limited to, oyster mortality, oyster disease, damage to oyster beds or decreased oyster production, due to siltation, pollution or other causes.

All leases issued between 1989 and 1995 contain the same clause while leases issued from July 1995 to the present contain even more detailed indemnity clauses, namely the Coastal Wetlands Restoration Advisory Clause [FN14] and the Allocation of Risk and **17 Liability, and Indemnity Clause. [FN15] *1098 These clauses were inserted into the leases given the fact that several suits had been filed as of 1995 by various oyster leaseholders alleging damages as a result of freshwater diversion structures (including this suit), and more were expected. These clauses were also in accordance with Legislative amendments in 1995 to the existing coastal restoration statutes requiring that the State be held harmless regarding coastal restoration in an effort to promote coastal restoration for the good of the public. [FN16]

> FN14. This clause provided:
>
> Lessor hereby formally advises and Lessee acknowledges the following: The State has undertaken, and intends to undertake, a number of coastal restoration projects, including freshwater diversion projects, within the State. The decision to undertake these projects was based upon

the need to conserve, restore, create, and enhance coastal wetlands as well as dependent fish and wildlife populations through a number of methods, including the recreation of the historical role of the Mississippi River system, which formerly not only nourished but also established these wetlands prior to the construction of the Mississippi River levee system. Inasmuch as these wetlands continue to disappear at an alarming rate, it is necessary to partially divert the flow of a number of the rivers, streams, canals, bayous, and other water bodies within the State of Louisiana, or to move dredge spoil or conduct other coastal restoration projects to re-establish these wetlands. As a result, it is possible, if not probable, that these coastal restoration projects may have some adverse effect on the waters and water bottoms, as well as on any oysters on some of the State water bottoms leased to oyster fishermen.

The State is obligated pursuant to Article IX, Section I of the Louisiana constitution as well as the public trust doctrine associated therewith, to undertake these coastal restoration projects so as to protect Louisiana's natural resources for the benefit of the people of the State. Accordingly, pursuant to the Louisiana Constitution and the public trust doctrine, the State as Lessor hereby conveys to Lessee a limited interest in the water bottom which is described in this lease, subject to the conditions that: (1) this lease is subservient to the State's past, present or future coastal restoration projects; (2) the State's coastal restoration projects may cause adverse effects in the area of this lease; and, (3) the State is only issuing this lease based upon the mutual understanding of both the State and Lessee that Lessee's property interest conveyed by this lease shall not include any right whatsoever to make claims against the State as a result of freshwater diversion or any other coastal restoration projects provided that, the State and the United States

shall remain responsible for their own (1) acts or omissions which are not reasonably related to the legitimate governmental objective for which the policy-making or discretionary power of the State and/or the United States exists; or (2) acts or omissions which constitute criminal, fraudulent, malicious, outrageous, reckless, or flagrant misconduct.

...

FN15. This clause provides:
Lessee further acknowledges that Lessee has no intent to pursue any claims for damages against the State of Louisiana and/or the Wildlife and Fisheries Commission and/or the State's departments and agencies, related to or arising out of or resulting from coastal restoration projects contained in an approved annual Coastal Wetlands Restoration Plan and undertaken by the State for the benefit of the people of Louisiana, including, but not limited to, freshwater diversion projects. Further, in consideration of the issuance of this lease, Lessee shall assume all liability and risk of loss, and agrees that this lease is subservient to all past, present or future coastal restoration projects as described above. Lessee also agrees to indemnify and hold the political subdivisions wherein lies the acreage associated with this oyster lease, and any political subdivision which has implemented or may implement a coastal restoration project affecting this oyster lease as well as the State of Louisiana, and/or the United States, their officials, representatives, employees, agencies, departments and/or commission, harmless from and for, all loss, damage, costs and/or expense in any way associated with this oyster lease and the oysters, cultch, reefs and beds located therein, including any loss, sustained by the Lessee and any affiliated persons or entities working with or through Lessee, arising out of, connected with, incident to, or directly or indirectly resulting from or related to diversion of freshwater or

sediment, depositing of dredged spoil or other material or any other action taken pursuant to coastal restoration projects undertaken by the State and/or the United States, ... for the benefit of the people of the State of Louisiana. Such coastal restoration activities include, but are not limited to, the management, preservation, enhancement, creation or restoration of coastal wetlands, water bottoms or dependent fish and wildlife populations. Damages include, but are not limited to, oyster mortality, oyster disease, damaged oyster beds or decreased oyster production, loss of revenue and/or loss of income due to siltation, changes in salinity, pollution or other causes, regardless of the passive, concurrent, active or sole negligence of the State of Louisiana and/or the United States ..., and regardless of whether liability without fault, strict liability, absolute liability, or liability for inverse condemnation, liability for a "taking" in violation of the constitutions of the United States or the State is alleged or imposed upon the State and/or the United States ...

FN16. That legislation reads in pertinent part:

Section 214.5 State and political subdivisions of the State held harmless in coastal restoration; licensees and permittees

A. Notwithstanding any other law to the contrary, the State of Louisiana, its political subdivisions, its agents or employees shall be held free and harmless from any claims for loss or damages to rights arising under any lease, permit, or license granted to any individual or other entity for any purpose on State lands or water bottoms from diversions of freshwater or sediment, depositing of dredged or other materials or any other actions, taken for the purpose of management, preservation, enhancement, creation or restoration of coastal wetlands, water bottoms, or related renewable resources.

B. All departments, agencies, boards, or commissions of

the State of Louisiana and its political subdivisions shall include language which shall hold the State and its political subdivisions harmless for the purposes set out in this Section and all leases, permits, or licenses granted to any individual or other entity after July 1, 1995.
Acts No. 936, Section 1, effective July 1, 1995. Section 2 of Act 1995, No. 936 provides as follows:
Section 2. This Act is intended to be remedial in nature and delineates legislative intent and shall be retroactive as it applies to any leases, permits, or licenses granted to any individual or other entity on State lands and water bottoms whose rights may be affected by coastal restoration projects.

**18 All leases issued from July 1995 to present contain the Coastal Wetlands Advisory Clause and the Allocation of Risk and Liability and Indemnity Clause, which include 53 of the approximately 64 leases remaining in this case.

In spite of the undisputed fact that the language of the 1989 clause is clear on its face and explicitly releases the State from *1099 any liability to the oyster fishermen due to this diversion project, the court of appeal found that our prior decision in *Jurisich v. Jenkins*, 99-0076 (La.10/19/99), 749 So.2d 597, dictates the conclusion that the "unilateral insertion" of the 1989 hold harmless clauses are "legally invalid." 858 So.2d at 706. As to the post-1995 hold harmless clauses, the court of appeal recognized a 2000 statutory amendment that purportedly permitted the State to insert indemnity clauses into oyster leases, 2000 La. Acts No. 107, and that applied to oyster leases renewed or extended after July 1, 1995, but did not consider the validity of the post-1995 indemnity provisions because it found that none of the leases at issue in this case were dated after July 1, 1995. [FN17] These holdings are erroneous, as *Jurisich* does not **19 compel the conclusion that the types of indemnity provisions in

plaintiffs' leases are legally invalid, and the evidence presented clearly showed that 53 leases were renewed between 1996 and 1998 that contained the more detailed indemnity clause.

> FN17. Act No. 107, 1st Extra Session (2000) resulted in the passage of La. R.S. 56:427.1, which contained language nearly identical to that contained in La. R.S. 49:214.5, which required that the State be held harmless from claims for alleged oyster mortality as a result of coastal restoration projects and required the insertion of an indemnity clause in all leases on State water bottoms issued or renewed after the effective date of the statute, July1, 1995. Both statutes were stated to be "remedial" and therefore purported to have retroactive effect insofar as leases issued before July 1, 1995. We have no reason to rule on the retroactivity issue as we base our ruling on other issues.

The issue in *Jurisich* was whether the DWF could refuse to renew oyster leases unless the oyster lessees agreed to the inclusion of a "navigation and oil field activity clause," which made the oyster leases "subservient to navigation, maintenance of navigation, and all normal, usual and permissible mineral and oil field activity which has been sanctioned by the State of Louisiana through a prior existing lease, permit, or contract." While the State had included other clauses in the leases at issue in that case, including the Coastal Wetlands Advisory Clause and the Allocation of Risk and Liability and Indemnity Clause, the Court expressly did not address the validity of these clauses. 749 So.2d at 599, 605 n. 8. Indeed, following an application for rehearing, this Court emphasized that "its discussion of the authority of the Secretary [of the DWF] and its ultimate holding were restricted to the inclusion of the navigation and oil field activity clause." *Id.* at 610. Accordingly, we expressly reserved the issue of whether that holding could be extended to other types of indemnity clauses, including in particular, the 1996 clauses at issue in this case.

Jurisich recognized that the statutory laws relative to the leasing of water bottoms for oyster production differ from the provisions that govern ordinary conventional leases addressed in Title IX of Book II of the Civil Code, La. C.C. arts. 2668, *et seq.* *Jurisich, supra* at 600 (citing **20*Vujnovich v. Louisiana Wildlife and Fisheries Commission*, 376 So.2d 330 (La.App. 4 Cir.1979)). [FN18] The Court found that the discretion the DWF has to renew an oyster lease *1100 is therefore limited by a determination of the lease's capability of supporting oyster populations under La. R.S. 56:428(A), and that legislative, or statutory, authority was necessary for an expansion of that authority. *Id.* at 601. The Court found that the legislative authority found in La. R.S. 56:425(C), which provides that "the [DWF] may make such stipulations in the leases made by him as he deems necessary and proper to develop the industry; however, these stipulations must be consistent with the provisions of this Subpart," did not grant the DWF authority to include the navigation and oil field activity clause.

> FN18. The *Jurisich* court explained this as follows:
> Except for reconduction provided in La. Civ.Code art. 2688 (reconduction of lease of predial estate by continued possession after expiration of the term) and 2689 (reconduction of lease of house or room by continued possession after expiration of term), renewal is a matter generally left to contractual negotiation. On the other hand, oyster lease renewal is statutorily provided and is not contingent upon a contractual provision for its existence.
> 749 So.2d at 600 n. 4.

One reason for this holding was the Court's finding that the State was obligated to give the oyster lessees the first right of renewal of their leases under La. R.S. 56:428(A), "provided the lease is capable of supporting oyster populations." As there was no showing that the lessees were incapable of supporting oyster populations, the State was found to have no right to fail to renew

them by adding an onerous clause. This case is distinguishable from *Jurisich* as the State may very well have been able to show that the leases would become incapable of oyster production after Caernarvon became operational and could have refused to renew the leases on that basis. However, as discussed above, rather than do this, as a compromise the State inserted the hold harmless clauses in 1989.

Another reason for the *Jurisich* court's holding that La. R.S. 56:425(C) did not **21 give the DWF the right to include the navigation and oil field activity clause in the lease was that the clause was not necessary and proper to develop the oyster industry as it abrogated the oyster lessees' rights under La. R.S. 56:423(B)(1) to sue third parties for negligent or wrongful injury to their leases. [FN19] *Id.* at 602-03. Therefore, La. R.S. 56:425(C) did not provide the DWF with the needed legislative authority to add the clause into the lease. The hold harmless clauses applicable in this case, on the other hand, contain stipulations that are necessary and proper to develop the oyster industry as a whole, as: (1) the clauses allowed oyster lessees, if they chose to continue to lease the property in spite of the coastal restoration efforts, to effectively risk that at some point the leases may be productive and to reap whatever other economic gains they could resulting from their status as lessees; (2) the clauses allowed the Caernarvon project to proceed without fear of economic disaster from lawsuits; (3) the Caernarvon project greatly improved oyster production on the public seed grounds; and (4) Caernarvon returned the area of productive oyster producing grounds to those which existed before the levee system began the coastal erosion process. The fact that certain leases became unproductive does not render the clauses unnecessary and improper for the development of the oyster industry. Further, unlike the situation in *Jurisich*, where the clause at issue was found to be invalid because it abrogated the lessees rights to sue third parties under La. R.S. 56:423(B), in this case, only the rights vis-a-vis the lessor and lessee are involved and the rights granted in La. R.S. 56:423(B) have never

been recognized by this Court as anything other than rights granted against third parties to the leases, such as oil companies, not against **22 the State. [FN20]

FN19. The stipulated purpose of that clause was to protect an oil and gas company from claims against it brought by a subsequent oyster lessee in the same area claiming damages for oyster mortality and bed damage as a result of the normal operations of the oil and gas company.

FN20. This Court has recognized that an oyster lessee has a valuable property right in his oyster beds, for the loss of which he can recover against one whose fault the loss was incurred. *Butler v. Baber*, 529 So.2d 374 (La.1988); *Doucet v. Texas Co.*, 205 La. 312, 17 So.2d 340, 341 (1944). Accordingly, courts have allowed oyster lessees to recover against third party oil companies under La. C.C. art. 667 for damage to their oyster beds caused by the oil companies' activities. *Inabnet v. Exxon Corp., supra* (holding that Exxon's use of property injured neighboring oyster lessee's property and constituted fault under Civil Code Article 2315 by analogy to Articles 667-669 such that oyster lessee was entitled to damages under La. R.S. 56:423(B)1 including loss of seed oysters and loss of income from anticipated production, but not restoration costs). However, the basis for the oyster lessee's recovery in these cases was the explicit statutory right of recovery granted in La. R.S. 56:423(B)1 which gives the oyster lessee "the right to maintain an action for damages against any person, partnership, corporation or other entity causing wrongful or negligent injury or damage to the beds or grounds under lease to such lessee." In all those cases, the tortfeasor was a third party to the lease; no court has ever recognized a right under this statute against the State.

*1101 Finally, the Court in *Jurisich* rejected DWF's argument that the public trust doctrine allowed them to insert the clause into the leases. *Id.* at 604-06. La. Const. art. IX, § 1 provides, in pertinent part:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

The *Jurisich* court noted that this Court in *Save Ourselves, Inc. v. Louisiana Environmental Control Com'n*, 452 So.2d 1152, 1157 (La.1984), has interpreted that article as follows:

> This is a rule of reasonableness which requires an agency or official, before granting approval of proposed action affecting the environment, to determine that adverse environmental impacts have been minimized or avoided as much as possible consistently with the public welfare. Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.

Id. at 604-605. In *Jurisich*, as the stipulated purpose of the clause at issue, i.e., to protect oil and gas companies from claims by oyster lessees was clearly not mandated by the public trust doctrine, the Court rejected the DWF's argument in that regard. **23 *Id.* Further, as the Constitution vests primary responsibility for implementing the public trust in the State legislature, the clause could not stand because it was contrary to state legislation.

The Court also specifically noted that "[i]n reaching this conclusion on the application of the public trust doctrine, we note that our determination is made in the context of the Secretary's duty to ***develop*** the oyster industry and is *only* made relative to the inclusion of the navigation and oil field activity clause, the only clause in the oyster lease now before us." *Id.* at 605 n. 8.

[2] We find that the implementation of the Caernarvon coastal diversion project fits precisely within the public trust doctrine. The public resource at issue is our very coastline, the loss of which is occurring at an alarming rate. The risks involved are not just environmental, but involve the health, safety, and welfare of our people, as coastal erosion removes an important barrier between large populations and ever-threatening hurricanes and storms. Left unchecked, it will result in the loss of the very land on which Louisianians ***1102** reside and work, not to mention the loss of businesses that rely on the coastal region as a transportation infrastructure vital to the region's industry and commerce. The State simply cannot allow coastal erosion to continue; the redistribution of existing productive oyster beds to other areas must be tolerated under the public trust doctrine in furtherance of this goal. *See* La. C.C. art. 450 and Comment (b) (stating that navigable water bodies are "public things that belong to the State," and that such property is "dedicated to public use, and held as a public trust, for public uses.")

[3][4] For all of the above reasons, the decision in *Jurisich* is clearly distinguishable from the case at bar, and does not make the hold harmless clauses inserted in 193 of the approximately 204 leases as early as 1989 legally invalid. We find that they are legally valid and clearly enforceable under the authority granted the DWF in La. R.S. ****24** 56:425(C). No further legislative authority was needed to validate these indemnity clauses, and we therefore have no need to delve into the possible retroactivity of the subsequent statutes which mandate the inclusion of these

clauses into oyster leases. [FN21] The claims covered by the leases that contained the 1989 indemnity clause are invalid, for either "takings" or damages, because these claims were filed in 1994 after these indemnity clauses were in effect. Likewise, the plaintiffs holding leases containing the more detailed indemnity clauses do not have valid takings or damage claims, even though this suit was filed in 1994 and these leases are dated July 1995 and later for the following reasons. First, it is under these leases that these plaintiffs claim their lease rights were taken by the State, as these were the leases offered into evidence by plaintiffs to prove their case. Second, these plaintiffs claim their leases were rendered permanently useless for commercial oyster production, which necessarily includes the time period covered by these post-1995 clauses. Had these plaintiffs claimed damage to their leases from the time Caernarvon began operation to the time they signed new leases with the post-1995 indemnity clauses, and had they alleged and proven specific monetary damages during this time period, they theoretically would have valid property damage claims. However, this was not the case they chose to make.

> FN21. Defendants filed a Peremptory Exception with this Court arguing that legislative action taken subsequent to the filing of this case applies to the facts of this case. The statutes at issue are Act No. 652, (2003) amending and reenacting La. R.S. 49:214.5, and which requires the State to be held harmless for coastal restoration projects (the 2003 Act re-enacted a statute previously amended in 1995, but before the 1995 Amendment to Article 12, § 10 of the Constitution allowing the legislature to expand the scope of the State's sovereign immunity and allowed for retroactive effect for that expanded sovereign immunity). On an issue unrelated to the hold harmless clauses, defendants' peremptory exception also cites Act No. 1295, which resulted in the passage of a joint resolution submitting an amendment to Article I, § 4 for popular vote. The

Amendment allows the Legislature to place limitations of the extent of recovery for "takings" or damages due to coastal restoration projects. Act No. 1295 also formed the basis for Act No. 583, enacting La. R.S. 49:213.9 to limit the recovery for property taken or affected by coastal restoration. This statute was to have retroactive effect and was to become effective if the proposed amendment to the Constitution embodied in Act No. 1295 passed, which it did in 2003.

**25 Thus, the named plaintiffs holding 192-193 of the approximately 204 leases in this case do not have valid takings claims because the indemnity clauses in their leases hold the state harmless from any and all claims for loss or damage to their rights under the leases caused by this *1103 coastal diversion project. [FN22] However, the named plaintiffs introduced into evidence 12 leases that are dated prior to 1989. Thus, because these lessees' takings claims are not precluded by virtue of any indemnity clauses, we must continue this analysis, which is applicable only to these remaining 12 leases.

FN22. Although the plaintiffs have asserted only "takings" claims under Art. I, § 4 of the La. Const. and under the Fifth Amendment of the U.S. Const., and did not assert property damage claims against the State, both "takings" claims and damages claims are covered by the hold harmless clauses.

The "Takings" Analysis

[5][6][7][8] The Louisiana Constitution provides:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

> Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss.... [FN23]

FN23. This Court has explained the legislative history behind the 1974 amendment to the Constitution allowing for compensation "to the full extent of his loss" in *State Through Dept. of Transp. and Development v. Chambers Inv. Co., Inc.*, 595 So.2d 598 (La.1992), as follows:

> There can be little doubt that one aim of Article I, § 4, of our state constitution in requiring that the owner shall be compensated for property "taken or damaged ... to the full extent of his loss" was to assure that the State and its subdivisions compensate owners for any taking or damaging of their rights with respect to things as well as for any taking or damaging of the objects of those rights. The history of Section 4 reveals a desire to increase the level and scope of compensation beyond that provided by pre-existing state law. The change from the 1921 constitution's language ("just and adequate compensation") to the new phrase ("compensated to the full extent of his loss") was deliberate, prompted by a belief on the part

> of the sponsors that inadequate awards had been provided under the prior law. L. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La.L.Rev. 1, 15 (1974); *cf.*, State, Dept. of Transp. & Dev. v. Dietrich, 555 So.2d 1355, 1358-59 (La.1990); State, Dept. of Highways v. Constant, 369 So.2d 699, 702 (La.1979) (the purpose of the additional language in Article I, § 4 was to compensate an owner for any loss sustained by reason of the taking, and not merely restricted as under the former constitution to the market value of the property taken and to reduction in the market value of the remainder).

595 So.2d at 602.

****26** La. Const. art. I, § 4. [FN24] In *Chambers*, we recognized that "our constitution requires compensation even though the State has not initiated expropriation proceedings in accordance with the statutory scheme set up for that purpose." 595 So.2d at 602. [FN25] ***1104** This "inverse condemnation" action "provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced." *Id.* Inverse condemnation claims derive from the Takings Clauses contained in both the Fifth Amendment of the U.S. Constitution and Art. I, § 4 of the Louisiana Constitution. "The action for inverse condemnation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal." *Id.* (Cites omitted.) The constitutional command of Art. I, § 4 is self-executing, such that the cause of action arises whenever a state commits a taking without justly compensating the victim. *Id.*

FN24. Act No. 1295 of 2003 added the following, which passed as a constitutional amendment to La. Const. Art. 1, § 4: "(E) Further, the legislature may place limitations on the extent of recovery for the taking of, or loss or damage to, property rights affected by coastal wetlands conservation, management, preservation, enhancement, creation, or restoration activities."

FN25. For an explanation of the differences between expropriation and appropriation, *see Wynat Development Company v. Board of Levee Commissioners for Parish of Orleans*, 97-2121 (La.4/14/98), 710 So.2d 783.

Recognizing the abstract nature of the concept of the taking and damaging of legal property rights, the Court in *Chambers* set forth a three-prong analysis in determining whether a claimant is entitled to eminent domain compensation. *Id.* at 603. In accordance with this analysis, the court must: (1) determine if a recognized **27 species of property right has been affected; (2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for a public purpose under Article I, § 4. *Id.; Constance v. State Through Dept. of Transp. and Development Office of Highways*, 626 So.2d 1151, 1157 (La.1993) (using C.C. arts. 667 and 668, which impose legal limitations on a landholder's right of ownership, to consider whether property was taken or damaged under Art. I, § 4).

Applying this judicially created framework to their claims, the plaintiffs claim a legal property right to their leased oyster beds, the oysters growing on them, and the future profits derived from those oysters. They claim that Caernarvon's changes to the salinity level of the waters covering those beds have damaged the beds' ability to cultivate oysters and, thereby, permanently deprived the harvesters of their rights to profits from oysters that would otherwise grow on those beds. They assert that

Caernarvon's diversion of freshwater into the waters covering their oyster beds is in furtherance of the state purpose of preserving coastal wetlands. Because the State's action in furtherance of a public purpose damaged their property rights in the oyster beds and the profits generated by the oysters that grow upon them, they claim the State is required to compensate them for damages to those rights.

[9] We find it unnecessary to conduct the full *Chambers* analysis, which seeks to determine whether a plaintiff is entitled to eminent domain compensation because his private property has been taken or damaged for public use. In this case, the relevant consideration is whether plaintiffs' property was "taken" for a public purpose, or whether it was "damaged" for a public purpose. A distinction between a taking and a damaging is necessary because of the existence of two relevant prescription statutes, La. R.S. 13:5111 and La. R.S. 9:5624. Section 5111 of Title 13 is entitled ****28** "Appropriation of property by state, parish, municipality or agencies thereof; attorney, engineering and appraisal fees; prescription" and provides in pertinent part: "[A] proceeding brought against the state of Louisiana ... or other political subdivision ..., for compensation for the taking of property by the defendant, other than through an expropriation proceeding, ... shall prescribe three years from the date of such taking." Section 5624 of Title ***1105** 9 provides: "When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after the completion and acceptance of the public works." Thus, although the Louisiana Constitution provides that just compensation shall be paid when property is taken or damaged, La. R.S. 13:5111 provides a three-year prescriptive period for **takings** and La. R.S. 9:5624 provides a two-year prescriptive period for **damage**. *A.K. Roy, Inc. v. Board of Commissioners for Pontchartrain Levee District*, 237 La. 541, 547-48, 111 So.2d 765, 767 (1959) (Prescriptive period

of La. R.S. 9:5624 applies only when private property is damaged for public purposes, but not actions for recovery of private property taken for public purposes).

The distinction between a taking and a damage claim was made in a case in which a holder of a predial lease invoked property rights pursuant to the 1921 Constitution. [FN26] **29*Columbia Gulf Transmission Co. v. Hoyt*, 252 La. 921, 215 So.2d 114 (1968). In that case, the Court found the lessee's rights under a predial lease fell under the constitutional designation of "private property" in Art. I, § 2 of the 1921 Constitution and required just compensation to the lessee before the lease rights were damaged, even though Louisiana codal law classified a lessee's rights as personal rights. [FN27] However, as particularly relevant to this case, the Court distinguished the terms "taken" and "damaged" in Art. I, § 2. The Court stated that "property is 'taken' when the public authority acquires the right of ownership or one of its recognized dismemberments." 215 So.2d at 120. "Property is considered 'damaged' when the action of the public authority results in the diminution of the value of the property." *Id.*

> FN26. Both the Constitution of 1921 and the Constitution of 1974 provided that property shall not be taken or damaged except for public purposes. Art. I, § 2 provided that "[e]xcept as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." As stated earlier, Art. I, § 4, provides in pertinent part that "[p]roperty shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit." The minutes from the 1973 Constitutional Convention indicate that one change from the 1921 Constitution was that "quick takings" would be expressly allowed under the 1974 Constitution in that the State would not have to pay for the appropriation before it

occurred. *Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts,* Vol. VI, pp. 1234-1244. In fact, it was stated that the main purpose of the 1974 Amendment was to allow for appropriations as well as expropriations.

FN27. This Court has previously found that even an unrecorded lessee has a recognized property interest entitled to compensation under Art. I, § 4. *State Dept. of Transp. and Development v. Jacob,* 483 So.2d 592 (La.1986); *see also Lewis Blue Point Oyster Cultivation Co. v. Briggs,* 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed.2d 1083 (1913) (for purposes of state law, a leasehold interest is generally recognized as a property interest). The *Jacob* court determined that "the clear intent of the framers of [the 1974] Constitution was to expand the right to compensation to include not only the property owners, but also of other persons who have legal status to require compensation such as lessees." *Id.* at 594.

In *Hoyt,* this Court stated that beginning in 1880, in the case of *In Re Morgan R.R. & S.S. Co.,* 32 La. Ann. 371, and continuing, courts have awarded lessees compensation for leases in land expropriations, because when land subject to a lease is taken for public use, the lease terminates. This Court noted that lease rights, however, may be damaged other than by termination of the lease. If the land taking is partial only, such as in the acquisition of a servitude for passage, the taking ***1106** may damage lease rights, although the lease has not been destroyed.

We have no trouble classifying this case as a "damage" case under Art. I, § 4 rather than a "takings" case, for numerous reasons. It is undisputed that the state owned and continues to own the water bottoms. La. R.S. 9:1101. The state owns the waters. *Id.* The state owns the oysters. La. R.S. 56:3. Thus, the State could not take ****30** its own property. As Judge Tobias aptly noted in dissent, "[t]he State cannot appropriate or

inversely condemn that which it already owns." *Avenal*, 01-0843, 858 So.2d at 740 (Tobias, dissenting).

Further, the oyster fishermen's right of exclusive use of the water bottoms was not taken as, in spite of Caernarvon, no other private party can use these bottoms to fish for oysters. In addition, their exclusive right to oysters and cultch thereon was not taken as no other private party can enter that lease and extract oysters or cultch. The changes in salinity of the water resulting from Caernarvon affected neither of these rights. As one court commented, "[t]he plaintiffs retained the use of their leaseholds, it was not the plaintiffs who were ousted by [Caernarvon], but the oysters." *Palm Beach Isles Associates v. U.S.*, 231 F.3d 1354, 1360 (Fed.Cir.2000) (explaining their holding in *Avenal, supra*, 100 F.3d 933).

Plaintiffs claim, however, that what was taken was their right to profitably harvest oysters from these waters because the salinity levels will prohibit this if Caernarvon is run at its full capacity as expected. Indeed, the court of appeal agreed and found that Caernarvon constituted a taking because it "rendered the plaintiffs' oyster leases permanently useless for commercial oyster production." *Avenal, supra*, 858 So.2d at 706. However, this somehow assumes that the State intended to guarantee each lessee a commercially viable oyster lease. La. R.S. 56:423 never mentions nor suggests that lessees are entitled to profits. Further, the oyster statutes do not guarantee the oyster lessees with a vested right to an optimal salinity regime in the State's own waters, nor that the state maintain a certain salinity regime favorable for oyster cultivation. As one commentator has stated, "[o]ne can hardly imagine why the state would charge only two dollars per acre if indeed the purchase of a lease automatically conferred a right to $21,000 or more per acre in expected profits upon **31 all oyster lessees who attempt to harvest oysters on leased lands." Robert L. Rogers, III, *Turning River Water into Gold: Why Oyster Harvesters should not be Permitted to Cash In On Changes in Salinity Caused by the Caernarvon Water*

Diversion Project, 22 Va. Envtr. L.J. 53, 72 (2003) (case note); *see also* Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Com'n., 97-1367 (La.5/19/98), 715 So.2d 387, 392-92 (citing *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) ("loss of future profits-unaccompanied by any physical property restriction-provides a slender reed upon which to rest a taking claim ... [T]he interest in anticipated gains has traditionally been viewed as less-compelling than other property-related interests.")).

Further, the court of appeal's holding that Caernarvon rendered the plaintiffs' oyster leases *permanently* useless for commercial oyster production fails to take into account that, as to those 12 leases which did not contain indemnity clauses, they all expired between 2000 and 2005, at which time the they would either be renewed with the post-1995 hold harmless clause, or not renewed at all upon a finding by the State that the leases were incapable of supporting oyster population. At most, *1107 these plaintiffs with pre-1989 leases possibly had a claim for property damage up until the time these leases expired.

In addition, in this case, the class representatives testified that they continued to exercise their right to claim damages from oil and gas interests for drilling, surveying, dredging, and other exploration activities conducted on their leases following the diversion, even though the leases were unproductive for oysters. Several of the oyster lessees also filed claims with the federal government for the damages to their oyster leases as a result of Hurricane Andrew. Evidence was also presented at trial that some of the leases were still producing oysters. Thus, Caernarvon did not **32 deprive the plaintiffs of all economically beneficial use of their property. However, it may have damaged their property rights in their oyster beds and the profits generated by the oysters that grow upon them.

[10][11] For the above reasons, the rights under the remaining 12 leases may have been "damaged" under Art. I, § 4, but they have not been "taken." [FN28] Therefore, ***1108** the ****33** prescriptive period of La. R.S. 9:5624 applies to these claims.

> FN28. Plaintiffs have also asserted a claim under the Fifth Amendment of the U.S. Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amendment V; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 307 n. 1, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (Fifth Amendment applies to the states as well as the federal government).
> Under federal law, when the government limits the use a property owner may make of his or her property, without itself occupying or otherwise using the property for government purposes, the classic analytical tool for assessing whether a taking has occurred is the three-part test enunciated by the Supreme Court in *Penn Central, supra:* the court considers the character of the governmental action, the economic impact on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations. 438 U.S. at 124, 98 S.Ct. at 2659. As stated in *Avenal v. State, supra*, 100 F.3d at 937, because the plaintiffs were well aware that Caernarvon was being planned as early as the 1970's, "they cannot have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments." The Supreme Court reaffirmed in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), that when state action results in a partial taking of a claimant's property rights, the *Penn Central*, analysis, including the investment-backed expectations

requirement, is clearly applicable.

The plaintiffs claim, however, that Caernarvon deprived them of all economically beneficial and productive use of their property, and that therefore, the *Penn Central* test is not applicable. However, if Caernarvon did entirely deprive them of all economically beneficial and productive use of their property rights, the plaintiffs are still not entitled to compensation as Caernarvon was a valid exercise of the state's police power under federal law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

The *Lucas* Court reasoned that unlike a partial taking, where the elements of *Penn Central* were "keenly relevant" to the takings analysis, 505 U.S. at 1019 n. 8, 112 S.Ct. 2886, a regulation that prohibited all economically beneficial use of land should be treated in the same manner as state action which results in a "permanent physical occupation" of the land, in which the government has a categorical duty to compensate the former owner. *Id.* at 1028-29, 112 S.Ct. 2886. However, even in this circumstance, compensation is not owed if the state action is in accordance with a "background principle" of the state's property law that already prohibit the landowner from the use he claims was taken, or is undertaken in the exercise of the state's police power. As explained by the *Lucas* court, compensation is not owed because no legally existing rights were being taken under those circumstances.

Thus, even analogizing the operation of Caernarvon to a regulatory taking that eliminated all economically beneficial uses of the oyster lessees' property or a permanent invasion of plaintiffs' leases, the plaintiffs would not be entitled to compensation under the *Lucas* analysis for two reasons. First, the right of the state to disperse fresh water from the Mississippi River over saltwater marshes in order to prevent coastal erosion is derived from a background principle of Louisiana law.

The concerns of the state and federal government and the plans to divert water to alleviate these concerns date back as early as the 1950s and 60s and were certainly a part of the environment in which the raising and harvesting of oysters were conducted. The State has always had this right and their leases were expressly made subject to this right. More particularly, the oyster fishermen knew this particular project was underway and that it would alter the salinity levels in the waters covering their leases. Secondly, the freshening of these waters in order to prevent further coastal erosion and save Louisiana's coast is a matter of "actual necessity" as it will "forstall [a] grave threat to the lives and property of others." 505 U.S. at 1029, n. 16, 112 S.Ct. 2886. *See also Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (in which the Court rejected the claim that Virginia state officials effected a taking by authorizing the destruction of cedar trees which harbored pests threatening the state's apple crop holding that "[w]hen forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public"). The plaintiffs freely admit that coastal erosion is a serious threat that affects this State and that Caernarvon has been successful in preventing it. *See also New Orleans Campaign For a Living Wage v. City of New Orleans*, 02-0991 (La.9/4/02), 825 So.2d 1098, 1104 (defining the State's police power under Louisiana law); *Bass v. State*, 34 La. Ann. 494 (1882); *Bd. of Comr's of Orleans Levee Dist. v. Dept. of Nat'l Resources*, 496 So.2d 281, 289 (La.1986) (on rehearing).

Prescription under La. R.S. 9:5624

[12][13][14][15] La. R.S. 9:5624 [FN29] provides as follows:

FN29. It is well settled under Louisiana law that when conflicting statutes are applicable, the one more specifically directed to the matter applies. *Estate of Patout v. City of New Iberia*, 98-0961 (La.7/7/99), 738 So.2d 544. While La. C.C. art. 3492 provides a one year general prescriptive period for delictual actions, La. R.S. 9:5624 is directly applicable to claims for private property damaged for public purposes.

When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after the completion and acceptance of the public works.

The purpose of La. R.S. 9:5624 is to limit the exposure of the State and its political subdivisions to liability in connection with a public work to a reasonable period of time. *Lyman v. Town of Sunset*, 500 So.2d 390 (La.1987). [FN30] This Court has **34 specified that "not every lawsuit for damages caused by a public entity or involving a public works project falls within the purview of R.S. 9:5624." *Estate of Patout v. City of New Iberia*, 98-0961 (La.7/7/99), 738 So.2d 544, 549. In order to fall under the statute, damage must be incurred "for public purposes." *Id.* Damage is incurred "for public purposes" when the damaging is "intentional or occurs as a *1109 necessary consequence of the public undertaking." *Id.* at 553. "[E]ven unintentional damage can be inflicted 'for public purposes' if it is a 'necessary consequence' of the public project." *Id.*

FN30. La. R.S. 9:5624 was amended in 1987 by Act No. 339, § 1, it formerly read:
When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run when the damages are sustained.
The Court in *Lyman* held that the prescriptive period begins to run when the first occurrence of damage is

actually sustained. 500 So.2d at 393. The Court held that La. R.S. 9:5624 was intended to be an exception to La. C.C. art. 3492, the general one-year prescriptive statute for delictual actions, by allowing two years from bringing suit when private property is damaged for public purpose. *Id.* However, "while allowing an addition year to bring suit, the statute serves to limit governmental exposure by requiring 'any and all actions' must be brought within two years after damages are sustained." *Id.* at 392.

As explained by Judge Tobias in his dissent, plaintiffs' claims fall under La. R.S. 9:5624 because "it is undisputed that the damages sustained by the plaintiffs to their leasehold interest, in addition to the loss of their oyster crops and loss of anticipated income from those oysters, were a necessary consequence of the public work [Caernarvon] and incurred for a public purpose." 858 So.2d at 742 (Tobias, dissenting). "The construction and operation of the Caernarvon Freshwater Diversion Structure were mandated by the U.S. Congress and the State of Louisiana for the dual purposes of restoring the State's coast for hurricane and flood protection and enhancing oyster production on the State's public seed grounds." *Id.*

[16][17] Caernarvon was completed and accepted in 1991. The record reflects that the official dedication ceremony of Caernarvon was held on April 12, 1991, it went online in September of 1991, the operational flow began at least by November 6, 1991, and the class representatives claimed their damages began to occur when Caernarvon **35 began diverting freshwater in 1991. [FN31] Thus, all of the key dates for prescription purposes occurred in 1991. [FN32] Pursuant to La. R.S. 9:5624, the plaintiffs would have had to file their claim for damages no later than November 1993, at the latest, which was

two years from the date the project began to divert freshwater. Because the plaintiffs' suit was not filed until March 29, 1994, any claims these oyster fishermen had for damages under La. R.S. 9:5624 are prescribed. [FN33]

FN31. We reject plaintiffs' argument that any claim they have under La. R.S. 9:5624 has not prescribed because their leases were not really damaged until the rate of flow was increased in 1994 from 4,000 cubic feet per second to 8,000 cubic feet per second. This is contrary to the class representatives' testimony at trial, and contrary to the position they have held all along. Further, La. R.S. 9:5624 has a strict two-year time limit, and, as we stated in *Lyman,* the legislature intended to limit governmental exposure by requiring "any and all actions" to be brought within this time limit. Further, the time limit is not subject to the continuing tort doctrine, as is the general one-year prescriptive period of La. C.C. art. 3492. *Estate of Patout, supra* at 549, n. 5. Even under the statute as it existed before the 1987 amendment, prescription began to run from the moment the first damage is actually sustained. *Lyman, supra.* The time period provided by La. R.S. 9:5624 as it now reads appears to limit governmental exposure even further, by commencing the running of prescription upon "completion and acceptance of the public works." Thus, the plaintiffs were required to bring "any and all actions" for damages within two years after completion and acceptance of Caernarvon.

FN32. While we have been unable to ascertain from the record the exact date of "acceptance" of Caernarvon, given the above key dates, it necessarily must have been accepted between April and November of 1991.

FN33. Defendants filed an exception of prescription under La. R.S. 9:5624 on September 28, 2000.

CONCLUSION

The oyster fishermen are not entitled to compensation under La. Const. Art. I, § 4 by virtue of the operation of Caernarvon for several reasons. First, the vast majority of the leases at issue contained hold harmless and indemnity clauses which validly released the State from liability as a result of this coastal diversion project. Secondly, the property rights under the 12 leases not containing hold harmless clauses were not "taken" by virtue of Caernarvon under Art. I, § 4. To the extent that the any of the oyster fishermen's property rights under these remaining 12 leases ***1110** were "damaged" under Art. I, § 4, these damage claims prescribed two years from the completion and acceptance of Caernarvon under La. R.S. 9:5624.

**36 DECREE

For the reasons expressed herein, the judgments of the lower courts are reversed and plaintiffs' claims are dismissed.

REVERSED.

JOHNSON, J., concurs in result.

WEIMER, J., additionally concurs with reasons.

**1 WEIMER, J., concurring.

The conflict in the instant case is between the rights of individuals and governmental actions which serve the public good. The importance of the outcome of this conflict makes the task of balancing these interests all the more arduous. I write to emphasize the importance of the oyster industry and the importance of the state's fight against coastal erosion to the future well-being of this state. Nevertheless, while acknowledging that individual rights must be respected and protected and that government must be allowed to take those

actions which prevent calamity, ultimately, as judges, our role is to apply the law to the facts before us.

The oyster industry has been and continues to be vital to Louisiana's economy. As stated in *A Brief History of the Louisiana Oyster Industry:*

> [C]ultivation of oysters has developed over the years into a partnership between the state and private oystermen through the use of both public seed grounds [[FN1]] and privately leased state water bottoms.
>
> > FN1. Learning from experience, the fishermen began moving "seed oysters" from overcrowded reefs to areas where salinity was more favorable, current more steady, and food more plentiful. The oystermen gathered the seed oysters, planted them in a favorable spot, allowed the seed to grow into mature, market-size oysters, and harvested the crop.
> >
> > ....
> >
> > The leasing of water bottoms began in the 1850s when oystermen leased areas from the parishes. However, when the Louisiana Oyster Commission (predecessor to the Louisiana Department of Wildlife and **2 Fisheries) was formed in 1902, oystermen began leasing water bottoms from the state.
> >
> > ....
> >
> > The Louisiana oyster industry is one of the most successful oyster fisheries in the country.

Posted by the Louisiana Department of Wildlife and Fisheries, *a i* h t t p : / / www.wlf.state.la.us/apps/netgear/index.asp?cn=lawlf&pid=1084.

Oyster farming has historically been arduous, backbreaking work requiring a special dedication. Oyster farming is fraught

with all the difficulties and risks farmers on land face--such as variances in weather conditions and pests-- as well as those peculiar to aquaculture. Louisiana has historically leased water bottoms for a nominal value because this property had little intrinsic value. Through hard work and dedication, many oyster fishermen built reefs with materials referred to as cultch [FN2] over the muddy water bottoms, turning unproductive lands into an area producing bountiful crops of oysters. Conversion of this previously barren property into productive oyster-producing areas has spanned generations.

FN2. *See* Footnote 10 of majority opinion.

In addition to the leased acreage, market oysters from Louisiana's public seed grounds account for approximately one third of the annual harvest. Assane ***1111** Diagne and Walter R. Keithly, Jr., *The Demand for Relaying by the Louisiana Oyster Industry* (2000), *at* http://oregonstate.edu/dept/IIFET/2000/abstracts/keithly.html.

Estimates indicate state oyster production creates about 10,000 jobs and generates $266 million a year in Louisiana. During 2000, Louisiana produced approximately 10.22 million pounds of the 16.6 million pounds of oyster meat produced nationally--representing approximately 63 percent of the total United States oyster production. It is believed that Louisiana now produces over 70 percent of the ****3** total United States harvest. Agriculture Marketing Resource Center *at* http://www.agmrc.org/aquaculture/oystermain.html. In sum, the oyster industry is a valuable economic asset of Louisiana. Oysters are a rich part of Louisiana's history, heritage, culture, cuisine, and folklore. Louisiana oysters are prized by chefs world-wide as a delicacy.

However, many historically productive areas are likely to be of little value in terms of their ability to produce significant quantities of oysters due to wetlands erosion and subsidence.

The Demand for Relaying by the Louisiana Oyster Industry by Assane Diagne and Walter R. Keithly, Jr., *supra.* Thus, freshwater diversion, which is an integral part of coastal restoration, [FN3] is important to the viability of **1112 the **4 oyster industry as a whole. A unique feature of this case is that although there may be loss by individuals on private leases caused by the freshwater diversion, losses may be offset by oyster production on public grounds, which the evidence established increased dramatically. Oyster productivity from the public seed grounds increased by 300 percent, a fact acknowledged by plaintiffs in brief.

FN3. The plight of Louisiana's coast and its wetlands warrants national concern.

Many factors, some natural, some due to human intervention, are converging to result in the loss of Louisiana's wetlands and the concomitant alteration of its coast. Louisiana, because of its many bays and sounds, has the longest coastline (15,000 miles) of any state and 41 percent of the nation's wetlands. Louisiana Department of Economic Development *available at* http:// www.crt.state.la.us/crt/profiles/industry.htm. The losses are alarming and devastating.

The rate of coastal land loss in Louisiana has reached catastrophic proportions. Within the last 50 years, land loss rates have exceeded 40 square miles per year, and in the 1990's the rate has been estimated to be between 25 and 35 square miles each year. This loss represents 80% of the coastal wetland loss in the entire continental United States.

The reasons for wetland loss are complex and vary across the state. Since the scale of the problem was recognized and quantified in the 1970's, much has been learned about the factors that cause marshes to change to open water and that result in barrier island fragmentation and submergence. The effects of natural processes like subsidence and storms have combined with human

actions at large and small scales to produce a system on the verge of collapse.

System collapse threatens the continued productivity of Louisiana's bountiful coastal ecosystems, the economic viability of its industries, and the safety of its residents. If recent loss rates continue into the future, even taking into account current restoration efforts, then by 2050 coastal Louisiana will lose more than 630,000 additional acres of coastal marshes, swamps, and islands. The loss could be greater, especially if worst-case scenario projections of sea-level rise are realized, but in some places there is nothing left to lose.

Along with the loss of acreage goes the loss of the various functions and values associated with the wetlands: commercial harvests of fisheries, furbearers, and alligators; recreational fishing and hunting, and ecotourism; habitats for threatened and endangered species; water quality improvement; navigation corridors and port facilities; flood control, including buffering hurricane storm surges; and the intangible value of land settled centuries ago and passed down through generations. **The public use value of this loss is estimated to be in excess of $37 billion by 2050, but the losses associated with cultures and heritage are immeasurable.** (Emphasis supplied.)

Louisiana Coastal Wetlands Conservation and Restoration Task Force and the Wetlands Conservation and Restoration Authority.1998. Coast 2050: Toward a sustainable Coastal Louisiana. Louisiana Department of Natural Resources. Baton Rouge, La., Chapter 1, page 1. (In 1998, the State of Louisiana and its Federal partners approved a coastal restoration plan entitled *Coast 2050: Toward a Sustainable Coastal Louisiana.* That document presented strategies jointly developed by federal, state, and local interests to address Louisiana's massive coastal land loss problem.) Eloquently stated is the following:

Over a million acres have disappeared since the 1930s and, at the present loss rate of 24 square miles a year, an additional 500 square miles of coastal land will wash away by 2050. Gone forever will be precious nursery habitat for fish and shellfish; nesting and feeding grounds for migratory waterfowl and wildlife; storm surge protection for vulnerable coastal communities, ports, and roads; and land that buffers oil and gas pipelines, production platforms, and shore-based processing facilities against storm and wave damage. Louisiana's coastal marshes are the cradle of nearly one-third of the total commercial fish and shellfish harvest in the lower 48 states. Seventeen percent of the nation's oil and twenty-five percent of its natural gas are mined in the state's offshore waters. Louisiana's four major ports handle more than 21 percent of U.S. foreign waterborne trade. **Calling Louisiana's coastal marshes "a national treasure" is no exaggeration.** (Emphasis supplied.)
Postings of Rhea Gary and C.C. Lockwood, http://www.marshmission.com/problem.cfm (2003).

Freshwater diversion became particularly important for the oyster industry after 1927 when the Mississippi River levee system was enhanced for navigation and flood prevention purposes. However, the construction of additional and larger levees prevented river water from reaching adjacent estuaries and the oyster beds located therein on both sides of the Mississippi River. Consequently, these areas continued to become more saline; the salinity killed the plant life that held the soil together. This, in turn, accelerated erosion, which was no longer being offset by the replenishing of land by suspended sediment from the river. As the land eroded, the saltwater intrusion from the Gulf of Mexico **5 continued farther inland. In response, the oyster fishermen relocated their oyster beds farther inland away

from encroaching saltwater predators and disease, but closer to the sources of manmade pollution.

Avenal v. State, Department of Natural Resources, 01-0843, pp. 2-3, (La.App. 4 Cir. 10/15/03), 858 So.2d 697, 710 (dissent by Judge Tobias).

I agree with the majority's detailed analysis of the plaintiffs' contracts that contain hold-harmless clauses. I also agree with the majority's discussion of prescription which applies to the remaining leases. A threshold consideration regarding prescription is a comparison of the property rights guarantee of the United States Constitution with the property rights guarantee of the Louisiana Constitution. The Fifth Amendment of the United States Constitution states in pertinent part: "No person shall be ... deprived of ... property, without due process of law; nor shall private property be *taken* for public use, without just compensation." (Emphasis supplied.) Article 1, Section 4 of the Louisiana Constitution of 1974 states in pertinent part: "Property shall not be *taken or damaged* by the state or its political subdivisions except for public purposes and with just compensation." (Emphasis supplied.)

Generally, the language of the Fifth Amendment has been given a broad meaning, which results in a "taking" in the constitutional sense not only when there is ***1113** a substitution of ownership but also when there is deprivation of ownership, including damage to, depreciation in value of, and destruction of property. 29A CJS *Eminent Domain* § 82 at 230 (1992). Likewise, in Louisiana, taking and damage claims are treated the same for most purposes, and it is seldom necessary to delineate between taking and damaging. *See State, Department of Transportation and Development v. Chambers Investment Company, Inc.*, 595 So.2d 598, 603 (La.1992); ****6***Constance v. State, Department of Transportation and Development, Office of Highways*, 626 So.2d 1151, 1156-1157 (La.1993). However, in cases where the differences between the two discrete rights specified in the

Louisiana Constitution--proscription of the state's **taking** personal property without just compensation and proscription of the state's **damaging** personal property without just compensation--form the dispositive issue, we must give effect to the language of the Louisiana Constitution.

The term "taken" as used in the Fifth Amendment has been interpreted broadly to include some, but not all, damages to private property. When federal or state government limits the owner's use of private property, without itself occupying or otherwise using the property for government purposes, the classic analytical tool used by the federal courts for assessing whether a taking has occurred is the three-part test enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). [FN4] *Avenal v. United States*, 100 F.3d 933, 937 (Fed.Cir.1996). The courts consider: "the character of the governmental action, the economic impact on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations." *Id.* Finding that these plaintiff oyster farmers did not have distinct investment-backed expectations, the federal appellate court rejected the argument that the Caernarvon Freshwater Diversion Structure (Caernarvon) resulted in a "taking" pursuant to the Fifth Amendment. Thus, the plaintiffs' claims were not compensable under the federal constitutional guarantee despite the broad interpretation accorded the word "taking" in the federal jurisprudence. [FN5]

FN4. *See* discussion of *Penn Central* and of plaintiffs' claim under the Fifth Amendment of the United States Constitution at Footnote 28 of the majority opinion.

FN5. Regarding any claims of the plaintiffs asserted pursuant to the U.S. Const. amend. V, I believe these claims are properly denied based on the rationale of the federal court in *Avenal*, 100 F.3d 933.

**7 In contrast, La. Const. art. I, § 4, using both words, "taken" and "damaged," encompasses damage claims that would not necessarily qualify as a taking under the Fifth Amendment Under Louisiana law, a damage claim is compensable although it is not a taking. Although "damages" sustained as a result of public projects are potentially compensable under the L isiana Constitution, not all claims that are compensable under deral law (because they are deemed to be "takings") are "takings" under Louisiana law.

In sum, because the Louisiana Constitution provides for compensation for property "taken" or "damaged," what is considered "taken" is a narrower concept in Louisiana when contrasted with federal law. Under federal law, interpretation of the term "taken" is broader. Under Louisiana law, the right to compensation is broad, but the interpretation of "taken" is narrower than in the federal sense. It would be incongruous for the identical governmental act for public purposes, the ***1114** Caernarvon project, to meet the narrower interpretation of "taken" called for by the Louisiana Constitution but not to meet the broader interpretation of "taken" for Fifth Amendment purposes. *See, Avenal,* 100 F.3d 933. The fourth circuit's decision that the Caernarvon project was a taking pursuant to the Louisiana Constitution was erroneous. *Avenal,* 01-0843 at 11-12, 858 So.2d at 705-706.

Thus, although the Louisiana Constitution provides that just compensation shall be paid when property is taken or damaged, LSA-R.S. 13:5111 provides a three-year prescriptive period for **takings** and LSA-R.S. 9:5624 provides a two-year prescriptive period for **damage**. [FN6] **8*A.K. Roy, Inc. v. Board of Commissioners for Pontchartrain Levee District,* 237 La. 541, 547-548, 111 So.2d 765, 767 (1959) (Prescriptive period of LSA-R.S. 9:5624 applies only when private property is damaged, but not to actions for recovery of private property taken for public purposes.).

FN6. Louisiana jurisprudence has applied the two prescriptive periods on a case by case basis, usually with the issue being whether one of these two prescriptive periods for eminent domain cases was applicable instead of some other prescriptive period, such as the one-year limitation for asserting tort claims. The two-year prescriptive period of LSA-R.S. 9:5624 has been applied in various factual situations. *See, Lyman v. Town of Sunset,* 500 So.2d 390 (La.1987) (Land developer's suit against town, alleging town's operation of landfill diminished property value and marketability of subdivision development, was subject to two-year prescriptive period.); *see also* appellate court cases cited therein, *Florsheim v. Department of Highways,* 201 So.2d 155 (La.App. 2 Cir.1967) (Claim for compensation by owner of buildings located adjacent to interstate highway right-of-way and structurally damaged by vibrations associated with construction of the highway was brought within the two-year limitation.); *Nuckolls v. Louisiana State Highway Department,* 337 So.2d 313 (La.App. 2 Cir.1976) (Claim of landowner whose property was adjacent to public highway construction site who sued for flooding caused by unauthorized alteration of natural drainage was not timely when filed more than two years from date of the first flooding.); *Carbo v. Hart,* 459 So.2d 1228 (La.App. 1 Cir.1984), *writ denied,* 462 So.2d 654 (1985) (Action against city for damages arising from flooding of plaintiffs' property which was immediately adjacent to city limits allegedly caused by work on a man-made drainage canal was time barred by two-year prescriptive period.); *Broussard v. Booth,* 446 So.2d 974 (La.App. 3 Cir.), *writ denied,* 449 So.2d 1357 (1984) (Plaintiff's claim against police jury for flooding of his property after a drainage construction project was time-barred because filed more than two years after plaintiff became aware of the flooding; police jury's action resulted in damages to plaintiff's property and not

a taking of the property when police jury had not expropriated, taken possession of the property, nor constructed any facility upon, under or over his property.)

In the instant case, suit was filed on March 29, 1994, which was more than two years after the completion, acceptance, and initial operation of the Caernarvon project. Suit was filed less than three years from the date the plaintiffs contend a "taking" occurred, when the oyster beds were "rendered permanently non-usable" for the commercial production of oysters. *See, Avenal v. State, Department of Natural Resources*, 01-0843, p. 12 (La.App. 4 Cir. 10/15/03), 858 So.2d 697, 705 ("When property has been rendered permanently non-usable for its only purpose, that is a taking.") Thus, the plaintiffs argue to this court that the court of appeal was correct in rejecting the state's plea of prescription, and the state argues that the court of appeal confused taking and damage claims.

In *Columbia Gulf Transmission Company v. Hoyt*, 252 La. 921, 215 So.2d 114 (1968), this court held that a predial lease is property within the meaning of the **9 Louisiana Constitution, requiring just compensation to the lessee before the lease rights were damaged. *1115*Hoyt*, 252 La. at 937-938, 215 So.2d at 120-121. Similarly, in *Avenal*, 100 F.3d at 936, the federal appellate court acknowledged that the plaintiffs owned valuable property rights in their leases of the water bottoms and remarked that the question was not whether plaintiffs had a constitutionally protected property interest, but whether that property interest was taken by the government.

As recognized by the majority in *Hoyt*, the Louisiana Supreme Court distinguished between what is considered "taken" as opposed to what is considered "damaged." "[P]roperty is 'taken' when the public authority acquires the right of ownership or one of its recognized dismemberments. Property is considered 'damaged' when the action of the public authority results in the diminution of the value of the property." (Citations omitted.)

Hoyt, 252 La. at 935, 215 So.2d at 120. [FN7] Because the state did not acquire any right of ownership, there was no taking from a Louisiana constitutional standpoint. *Id.* In the instant case, testimony at trial established many of the leases at issue were non-productive because they fell within the seasonal closure line; however, the leaseholders chose to retain the leases because they derive revenue from oil and gas interests that continue to conduct surveys, seismic activities, oil exploration, and lay pipelines on the leaseholds. *Avenal*, 01-0843 at 54, 858 So.2d at 738-739 (dissent). Other testimony indicated there was some oyster production subsequent to Caernarvon's going on line.

> FN7. *Hoyt* was decided before the adoption of the Louisiana Constitution of 1974. Both the Constitution of 1921 and the Constitution of 1974 provided that property shall not be taken or damaged except for public purposes. Although Article I, section 2 of the 1921 Constitution provided that "just and adequate compensation" was to be paid, while Article I, section 4 of the 1974 Constitution provides that a party whose property is expropriated "shall be compensated to the full extent of his loss[,]" the "taken or damaged" language remained unchanged.

****10** Lastly, as the majority notes, the state owns the water, water bottoms, and oysters. The state cannot take from someone that which it owns. Further, the oyster farmers still possess the leasehold interests. Thus, rather than taking, the state damaged [FN8] one aspect of plaintiffs' leasehold ***1116** interest; therefore, LSA-R.S. 13:5111 which applies to a taking is inapplicable to plaintiffs' claims.

> FN8. Although I conclude there was no taking, for the sake of analysis, I will assume there were damages. However, a forceful argument can be made to the effect that if the state exercises its police power to avoid a public calamity or in cases of imminent peril to the

general welfare, there is no compensable taking or damage. *See,* 29A CJS *Eminent Domain* § 8-10, p. 104-109. Here, the project was commenced, in part, because of the requests of the oyster industry. The area affected had not supported oysters historically until the construction of the levee system artificially altered salinity levels. The fresh water intrusion project, which had been publically discussed and planned for decades before its ultimate construction, benefitted the entire oyster industry because the public seed grounds blossomed, thus, limiting any potential losses suffered by plaintiffs. Further, relocation of the leaseholds was offered and plaintiffs declined. The salinity level to which the plaintiffs claim entitlement was an artificial level, resulting from salt water intrusion due partially to levee construction. It is this salinity level which, in part, is adversely impacting the coast. "The destruction of property to avert impending peril or disaster ... is an exercise of the police power, and not a taking under the power of eminent domain." 29A CJS § 9, pp. 108- 109. *See also,* footnote 3, *supra.* The majority's discussion concerning the public trust doctrine is consistent with the state's police power and the following constitutional provision, which prefaces the portions of La. Const. art. I, § 4 invoked by plaintiffs in their claim for compensation: "Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the *reasonable exercise of the police power.*" (Emphasis supplied.)

Having written to emphasize the significance of the divergent interests raised in this matter, I respectfully concur.

886 So.2d 1085, 34 Envtl. L. Rep. 20,122, 2003-3521 (La. 10/19/04)

Supreme Court of Louisiana

NEWS RELEASE # 091

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the **10th day of December, 2004**, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

2004-C - 3521	ALBERT J. AVENAL, JR., ET. AL. v. THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES (Parish of Plaquemines)
	Retired Judge Thomas C. Wicker, Jr., participated for Traylor, J., recused.

Court of Appeal of Louisiana,
Fourth Circuit.

Albert J. AVENAL, Jr., et al.
v.
STATE of Louisiana, DEPARTMENT OF NATURAL RESOURCES.

No. 2001-CA-0843.

Oct. 15, 2003.
Rehearing Denied Nov. 21, 2003.
Writ Granted Jan. 30, 2004.

Oyster fishermen brought class action against Department of Natural Resources, alleging constitutional taking of oyster leases as result of coastal restoration project. The 25th Judicial District Court, Parish of Plaquemines, No. 38-266, Division B, William A. Roe, J., rendered judgment in favor of fishermen following jury trial. State appealed. The Court of Appeal, Armstrong, J., held that: (1) replacement cost of suitable conditions of water bottoms of oyster fishermen's oyster leases was the appropriate measure of damages; (2) evidence supported finding that coastal restoration project was proximate cause of mortality of oysters on leases; (3) scientific expert testimony regarding use of side scan sonar to determine what portion of water bottom was covered by cultch failed to satisfy *Daubert* test and was inadmissible; (4) any error in trial court's failure to excuse jurors for cause was not reversible error; (5) three-year prescriptive period for governmental takings cases, rather than two-year prescriptive period for claims for "damage" to private property for public purposes, applied to action; and (6) permanent loss of commercial viability of oyster leases constituted a taking.

Affirmed as modified.

Murray, J., concurred and assigned reasons in which Byrnes, C.J., joined.

Love, J., concurred in part, dissented in part, and assigned reasons.

Tobias, J., dissented and assigned reasons.

West Headnotes

[1] Eminent Domain 122
148k122 Most Cited Cases
Under takings provision of the Louisiana Constitution, an owner of property taken by the State has rights to compensation which go beyond the rights to compensation provided by the Constitution of the United States and by other state constitutions. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.) U.S.C.A. Const.Amend. 5; LSA-Const. Art. 1, § 4.

[2] Eminent Domain 131
148k131 Most Cited Cases
State constitutional imperative of "full" compensation for governmental takings favors replacement cost, when that is greater than market value, as the measure of compensation to be applied. (Per opinion of Armstrong, J., with three judges concurring.) LSA-Const. Art. 1, § 4.

[3] Eminent Domain 221
148k221 Most Cited Cases

[3] Eminent Domain 262(4)
148k262(4) Most Cited Cases
In takings cases, the jury as the trier of fact is afforded much discretion and the jury's factual determinations, including its evaluation of expert testimony, may be disturbed on appeal only if they are clearly wrong, i.e., manifestly erroneous. (Per opinion

of Armstrong, J., with three judges concurring.) LSA-Const. Art. 1, § 4.

[4] Eminent Domain 147
148k147 Most Cited Cases
Replacement cost of suitable conditions of water bottoms of oyster fishermen's oyster leases, rather than market value of leases at time of taking, was the appropriate measure of damages in fishermen's action against Department of Natural Resources, alleging a state constitutional taking of oyster leases as result of coastal restoration project. (Per opinion of Armstrong, J., with three judges concurring.) LSA-Const. Art. 1, § 4.

[5] Eminent Domain 300
148k300 Most Cited Cases

[5] Evidence 571(9)
157k571(9) Most Cited Cases
Evidence supported finding that coastal restoration project of Department of Natural Resources was proximate cause of mortality of oysters on oyster fishermen's leases, thus supporting determination that fisherman were entitled to compensation under takings clause of State constitution; expert testimony and fishermen's historical experience showed that permanent loss of oyster productivity was attributable to coastal restoration project, and any continuing sporadic growth of oysters was not sufficient to make oyster leases commercially viable. (Per opinion of Armstrong, J., with four judges concurring.) LSA-Const. Art. 1, § 4.

[6] Evidence 555.2
157k555.2 Most Cited Cases
Under the *Daubert* test for admissibility of scientific expert testimony, the trial court must apply a multifactor test to make a preliminary determination of the reliability of the proposed expert testimony; if the trial court determines that the proposed expert testimony lacks the requisite indicia of reliability, then the

expert testimony is to be excluded. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.)

[7] Appeal and Error 971(2)

30k971(2) Most Cited Cases

The trial court's decision under the *Daubert* test as to whether to admit or exclude from evidence proposed scientific expert testimony is reviewed on appeal using an abuse of discretion standard of review. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.)

[8] Evidence 557

157k557 Most Cited Cases

In oyster fishermen's takings action against Department of Natural Resources, State failed to establish admissibility under *Daubert* test of scientific expert testimony regarding use of side scan sonar to determine what portion of oyster lease water bottom was covered by cultch, and thus such testimony was properly excluded; experts were experimenting with the technique in the course of their work for the present case, technique had not been the subject of peer-reviewed publication, and results of side scan sonar technique were at variance with other methods. (Per opinion of Armstrong, J., with three judges concurring.)

[9] Eminent Domain 262(5)

148k262(5) Most Cited Cases

In oyster fishermen's takings action against Department of Natural Resources, any error in trial court's failure to grant State's motion to excuse three prospective jurors for cause was not reversible error; trial court granted eight of State's thirteen challenges for cause as to prospective jurors, and State was able to use three of its six peremptory challenges to remove such jurors. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.)

[10] Eminent Domain 288(2)
148k288(2) Most Cited Cases
Three-year prescriptive period for governmental takings cases, rather than two-year prescriptive period for claims for "damage" to private property for public purposes, applied to oyster fishermen's action against Department of Natural Resources, alleging a state constitutional taking of oyster leases as result of coastal restoration project. (Per opinion of Armstrong, J., with four judges concurring.) LSA-Const. Art. 1, § 4; LSA-R.S. 9:5624, 13:5111.

[11] Eminent Domain 288(2)
148k288(2) Most Cited Cases
Two-year prescriptive period for claims for "damage" to private property for public purposes applies only to cases in which private property has been "damaged" but not taken by the State. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.) LSA-Const. Art. 1, § 4; LSA-R.S. 9:5624.

[12] Eminent Domain 2.1
148k2.1 Most Cited Cases
(Formerly 148k2(1))
When property has been rendered permanently non-usable for its only purpose as a result of government action, that is a taking under State constitution's takings clause. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.) LSA-Const. Art. 1, § 4.

[13] Eminent Domain 2.25
148k2.25 Most Cited Cases
(Formerly 148k2(5))

[13] Eminent Domain 2.27(2)
148k2.27(2) Most Cited Cases
(Formerly 148k2(5))

Permanent loss of commercial viability of oyster fishermen's oyster leases as a result of coastal restoration project of Department of Natural Resources constituted a taking under the State constitution's takings clause, even though State did not physically enter onto oyster leases, restoration project was not constructed on the oyster leases, and fishermen continued to have legal right to use the leased premises for oyster production. (Per opinion of Armstrong, J., with four judges concurring.) LSA-Const. Art. 1, § 4.

[14] Parties 35.63

287k35.63 Most Cited Cases

Owner of oyster leases was not precluded from acting as class representative in oyster fishermen's class action against Department of Natural Resources, alleging constitutional taking of oyster leases as result of coastal restoration project, even though owner was not itself entitled to entire damages award; owner owned oyster leases in the affected area, and trial court could insure that damages would be paid to appropriate oyster lease owners. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.)

[15] Fish 7(2)

176k7(2) Most Cited Cases

State's unilateral inclusion of onerous "indemnity clauses" in oyster leases was legally invalid. (Per opinion of Armstrong, J., with three judges concurring, and one judge concurring in part.)

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Attorneys General, Burke & Mayer, New Orleans, LA, for Defendant/Appellant.

(Court composed of Chief Judge WILLIAM H. BYRNES III, Judge JOAN BERNARD ARMSTRONG, Judge PATRICIA RIVET MURRAY, Judge TERRI F. LOVE and Judge MAX N. TOBIAS Jr.).

**1 JOAN BERNARD ARMSTRONG, Judge.

This is a class action by oyster fishermen who contend that their leases were taken, in a constitutional sense, by the State of Louisiana Department of Natural Resources. Following a jury trial, the trial court rendered judgment in favor of the plaintiffs. The State appeals. For the reasons given below, we will modify the quantum of damages awarded as to one of the plaintiffs but otherwise affirm.

The alleged taking occurred as a result of the operation of the Caernarvon Freshwater Diversion Structure (the "CFDS") as a coastal restoration measure. The ecology of the areas where the plaintiffs' oyster leases were located was altered as a result of the freshwater diversion so as to make those areas no longer suitable for oyster production. [FN1]

> FN1. The general background of the CFDS and the effect of its operation upon the plaintiffs' oyster leases is discussed in detail in *Avenal v. United States*, 100 F.3d 933 (1996).

Historically, the Breton Sound Basin, where the plaintiffs' oyster leases were located, contains a mixing of freshwater from the Mississippi River and other freshwater sources with saltwater from the Gulf of Mexico. As a result, much of **2 the area had water of intermediate salinity. In particular, much of the area had an intermediate salinity level that is suitable for oysters. Stated in a simplified manner: The area closest to land, and thus

closest to the sources of freshwater, had the lowest salinity and was not sufficiently saline for oysters. The area farthest from land, and thus closest to the Gulf of Mexico, had the highest salinity and was too saline for oysters. In between those two areas was the area of intermediate salinity that was suitable for oysters. Over time, the construction of flood-control levees on the Mississippi River reduced the flow of freshwater into Breton Sound. That reduction of freshwater flow, along with other man-made and natural changes, caused the area of intermediate salinity, suitable for oysters, to move landward. The area of higher salinity, which was not suitable for oysters, also moved landward. The reduction of the flow of freshwater and the landward movement of the area of higher salinity caused coastal erosion and loss of coastal wetlands.

The State, with assistance from the federal government, has undertaken a program of coastal restoration. With respect to Breton Sound, the coastal restoration effort requires the diversion of additional freshwater from the Mississippi River to Breton Sound. This diversion is done by means of the CFDS. This increased flow of freshwater moved the intermediate salinity area, which is suitable of oysters, outward away from the land. Areas closer to the land, which had previously had intermediate salinity, and which had been suitable ***701** for oysters, became areas of lower salinity which were no longer suitable for oysters. The area ****3** of higher salinity, which is not suitable for oysters, was moved farther from land. In sum, as a result of CFDS, some areas which had previously not been suitable for oysters became suitable for oysters and some areas which had been suitable for oysters were no longer suitable for oysters. The plaintiffs' oyster leases were in areas which were no longer suitable for oysters. [FN2]

> FN2. The plaintiffs also contend, and presented evidence, that some oyster leases became unsuitable for oysters because of the creation of marsh (which is a purpose of CFDS) and the deposit of sediment. The

plaintiffs also contend, and presented evidence, that CFDS led to closures of oyster leases due to fecal coliform. Fecal coliform lives longer in fresher water. Also, increases in animal life in newly-created marshland cause increases in fecal coliform. Additionally, the plaintiffs contend, and presented evidence, that the increased freshwater flow of CFDS caused the growth of eurasian milfoil, an aquatic plant, which made their oyster leases inaccessible by boat.

The CFDS is a success, and has halted coastal erosion and fostered coastal restoration. However, one of the costs of these laudable achievements is that the plaintiffs' oyster leases are no longer productive to a commercially feasible extent. Variations in the flow of freshwater through CFDS, particularly reductions of the flow of freshwater, can sometimes allow temporary, sporadic production of oysters on the plaintiffs' leases. However, assuming that CFDS will be used as intended, and there is no reason to doubt that it will be, and assuming that CFDS produces the results planned, and in fact it is doing so, the plaintiffs' oyster leases can no longer be used for commercial oyster production.

The first issue raised on appeal by the State is the quantum of damages. The water bottoms are owned by the State and leased to the plaintiffs. The plaintiffs presented damages evidence, which was accepted by the trial court, based upon the cost that would be required to "restore" (or, more accurately, recreate in another location) suitable conditions of the water bottoms of the plaintiffs' oyster leases. **4 More specifically, oyster leases, to be productive, must have water bottoms covered with "cultch", which is hard material such as crushed shells, gravel, etc. laid down over the mud or sand of the water bottom. The trial court awarded damages using a formula (referred to as the "cultch currency matrix") as to the cost (installed) of cultch on a per acre basis which cost it multiplied by the number of acres covered by the plaintiffs' oyster leases. In particular, the trial court awarded damages of $21,345 per acre.

The cultch currency matrix was developed by the State, Department of Natural Resources ("DNR"), in cooperation with various private groups (oyster fishermen, the oil & gas industry, environmental organizations, etc.), state and federal agencies (Department of Wildlife and Fisheries, Army Corps of Engineers, etc.) and biologists and other scientists with interests in coastal areas containing oyster leases. The State, DNR brought representatives of all of these various interests together at an Oyster Lease Valuation Matrix Workshop in March, 1995. The list of attendees at the Workshop includes a number of the expert witnesses who testified for each side below as well as the State's trial counsel below. Thus, the State was well-represented at the Workshop from a scientific, technical and even legal standpoint.

The minutes of the Workshop reflect that numerous issues and proposals were discussed covering scientific/technical, economic/financial and other topics. There were some issues and proposals as to ***702** which the various interests represented at the Workshop were unable to agree. However, consensus developed on ****5** sufficient issues and proposals that the Workshop was able to produce the cultch currency matrix as a consensus means of valuing damages to oyster leases. The State, DNR, adopted the matrix with minor modifications.

The matrix uses the cost of cultch (installed) as the "currency" for valuing oyster leases. The layer of cultch placed on the water bottom is necessary for the growth of oysters. The cultch currency matrix looks to the cost of the cultch (installed) on a per-acre basis as the measure of value of the oyster lease. Thus, in the present case, the cultch currency matrix measures the value of the plaintiffs' leases by the cost of replacing them at another location by the placement of the necessary cultch. (Interestingly, in another coastal area affected by the State's coastal restoration efforts, Davis Pond, the State has compensated or will compensate oyster lessees based upon the cost of installed cultch

which, as stated above, is the determinative factor in the cultch currency matrix.)

The State's principal objection to the use of the cultch currency matrix is that the matrix measures replacement value, rather than market value, and that the plaintiffs should be compensated based upon market value of their oyster leases as of the date they were taken by the State. After most careful consideration of the State's arguments and citations to legal authorities, we disagree with the State's contention for two general reasons.

[1][2] First, the Louisiana Constitution, at Article I, Section 4, mandates that when private property is taken for public purposes, the private property owner "has the right to a trial by jury to determine compensation, and the owner shall be **6 compensated *to the full extent of his loss.*" (emphasis added). Under this provision of the Louisiana Constitution, an owner of property taken by the State has rights to compensation which go beyond the rights to compensation provided by the Constitution of the United States and by other state constitutions. *State v.1971 Green GMC Van*, 354 So.2d 479 (La.1977); *State v. Spooner*, 520 So.2d 336 (La.1988); Jenkins, *The Declaration of Rights*, 21 Loy. L.Rev. 9 (1975). Thus, we believe that the Louisiana constitutional imperative of "full" compensation favors replacement cost, when that is greater than market value, as the measure of compensation to be applied. We note that, on some occasions when private property used for business purposes has been taken by the State, the Supreme Court has held that replacement cost, rather than market value, should be used as the measure of compensation to the private property owner. *See State, Through Dept. of Highways v. Constant*, 369 So.2d 699 (La.1979); *State, Dept. of Transp. and Development v. Dietrich*, 555 So.2d 1355 (La.1990). [FN3]

FN3. The State cites *Inabnet v. Exxon Corp.*, 93-0681 (La.9/6/94), 642 So.2d 1243. However, *Inabnet* was a tort case between private parties rather than a public

takings case implicating Article I, Section 4 of the Louisiana Constitution. In some cases, the compensation constitutionally required in a takings case is greater than would be the damages awarded in a tort case with the same facts. *See Packard's Western Store, Inc. v. State, Dept. of Transp. and Development*, 618 So.2d 1166 (La.App. 2 Cir. 5/5/93), *writ denied*, 629 So.2d 345 (La.1993).

[3][4] We also note that the Louisiana Constitution, as quoted above, specifically guarantees the right to trial by jury to determine compensation for the taking of private property for public purposes, and this makes us all the more cautious about ***703** upsetting the jury's determination of the amount of compensation in this case. The State presented evidence as to the market value of the plaintiffs' oyster leases, including most particularly the expert testimony of economist Walter Keithly, but ****7** the jury was obviously unpersuaded by the State's evidence as to value. It is well-established in takings cases both that the jury as the trier of fact is afforded much discretion and that the jury's factual determinations (including its evaluation of expert testimony) may be disturbed on appeal only if they are clearly wrong-manifestly erroneous. *See, e.g., State Through Dept. of Transp. and Development v. Estate of Davis*, 572 So.2d 39 (La.1990); *State, Dept. of Transp. and Development v. Pipes*, 489 So.2d 293 (La.App. 4th Cir.), *writ denied*, 492 So.2d 1219 (La.1986). Based upon the constitutional protection of the jury's determination, as well as the just-cited caselaw, we cannot say that the jury clearly erred in selecting the replacement cost as the measure of compensation in this case.

Our second general reason for disagreeing with the State's contention that market value should be used to determine compensation, rather than the replacement value of the plaintiffs' leases as determined by use of the cultch currency matrix, lies in policy considerations of consistency of treatment in the determination of compensation for the taking of oyster leases.

The State sponsored the creation of the cultch currency matrix as a means of determining the amount of compensation for the effective loss of oyster leases by man-made impacts. The State, DNR adopted the cultch currency matrix for use by the quasi-governmental Oyster Lease Damage Evaluation Board and that body makes determinations of compensation to oyster fisherman using the matrix. The State, DNR was the lead author of the cultch currency matrix. We note that the State has applied the cultch currency matrix in other situations. Therefore, we believe that the cultch currency **8 matrix appears to be the best means available to best achieve consistent compensation for the taking of oyster leases. Accordingly, we find that it was appropriate and consistent to apply the cultch currency matrix in the present case. [FN4]

> FN4. The jury awarded one of the class representative plaintiffs, Albert J. Avenal, only $1,000 per acre of oyster leases taken. Perhaps the jury treated Mr. Avenal differently because he acquired some (but by no means all) of his leases just as the present action was being filed. However, there is no evidence that Mr. Avenal, a well-established oyster fisherman, who had entered into prior such oyster lease transactions, was in any way in bad faith. Thus, there was no proper basis for Mr. Avenal to be treated any differently than the other plaintiffs. Consequently, we will modify the judgment so that Mr. Avenal receives the same compensation per acre as the other plaintiffs.

[5] The State's next argument on appeal is that the plaintiffs did not prove that CFDS was the proximate cause of oyster mortality on the plaintiffs' oyster leases. In particular, the State argues that there are multiple sources of freshwater in Breton Sound and that these sources of freshwater also killed oysters. Also, the State argues that, even after CFDS came on line, there have been oysters produced in Breton Sound.

However, the testimony of the various expert witnesses (both the plaintiffs expert witnesses and the State's own expert witnesses), as well as the plaintiffs' own testimony as to their actual historical experience with oyster leases in Breton Sound, shows that the permanent loss of oyster productivity is attributable to CFDS. Although oyster mortality can be caused by a "freshet," a sudden large infusion of freshwater caused by heavy rains, the oyster mortality so caused is transitory and followed ***704** by renewed oyster growth. Also, although the evidence shows that there was some oyster production in Breton Sound after CFDS came on line, it appears that this was sporadic oyster growth that occurred when the flow of freshwater through CFDS was temporarily reduced. However, this sporadic oyster ****9** growth was not sufficient to make the plaintiffs' oyster leases commercially viable. Moreover, it is apparent that, when CFDS is used at its planned capacity, and there is no reason to doubt that it will be, as opposed to the curtailed flow which allowed sporadic oyster production, the plaintiffs' oyster leases are rendered unsuitable for oysters.

Lastly on this "proximate cause" point, the State argues that the plaintiffs have not proven with specificity the amount of production from their leases prior to CFDS coming on line. However, so long as the plaintiffs proved generally that their leases were productive before CFDS came on line, and that they were not productive after CFDS came on line, and that CFDS caused the loss of oyster productivity, proximate cause has been proven.

The State next argues that the plaintiff class was improperly certified. However, this court's prior upholding of the class certification became final when the Supreme Court denied the State's writ application in *Avenal v. State, Dept. of Natural Resources*, 97-2747 (La.1/16/98), 706 So.2d 979. Thus, we cannot address this issue further.

[6] The State's next argument on appeal is that the trial court erred by excluding from evidence certain proposed expert testimony for the State which was based upon the use of side scan sonar. The Louisiana Supreme Court, in *State v. Foret*, 628 So.2d 1116 (La.1993), adopted the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as to the admissibility of scientific expert testimony. The trial court must apply a multifactor test to make a preliminary determination of the reliability of the proposed expert testimony. If the trial court determines that the proposed expert **10 testimony lacks the requisite indicia of reliability, then the expert testimony is to be excluded. An evidentiary hearing, out of the presence of the jury, can be useful to the trial court's determination and that procedure was utilized in the present case. The two State proposed expert witnesses both testified as to their side scan sonar technique as applied to the plaintiffs' oyster leases.

[7][8] The trial court's decision as to whether to admit or exclude from evidence the proposed expert testimony is reviewed on appeal using an abuse of discretion standard of review. *Collins v. State, ex rel. Louisiana Health Care Authority*, 99-2307 (La.App. 4 Cir. 7/12/00), 774 So.2d 167, *writ denied*, 2000-2633 (La.11/17/00), 775 So.2d 439; *Mitchell v. Uniroyal Goodrich Tire Co.*, 95-0403 (La.App. 4 Cir. 12/28/95), 666 So.2d 727, *writ denied*, 96- 0260 (La.3/15/96), 669 So.2d 421. The testimony at the *Foret/Daubert* hearing showed that, while the use of side scan sonar itself is well-established, the application of that technology to the determination of what portion of any oyster lease water bottom is covered by cultch is still very much a work-in-progress. Indeed, the State's experts were experimenting with the technique in the course of their work for the present case. The specific type of study undertaken in the present case has been done seldom, if ever, before. The specific technique employed has not been the subject of peer-reviewed publication. There is no generally-recognized rate

of error with the technique employed in the present case. This is not to say that *705 the State proffered "junk science", or that the State's experts were anything other than reputable scientists, but it is clear that the technique employed here is not mature scientifically. There was also evidence from "ground-truth", *i.e.*, actually feeling the water bottoms with poles, that was at variance with the side scan sonar data. **11 Under the circumstances, we cannot say that the trial court abused its discretion in excluding the side scan sonar evidence.

[9] The State's next argument on appeal is that the trial court erred by not granting three of the State's challenges for cause to prospective jurors, thus causing the State to use three of its six peremptory challenges to exclude those three jurors. Even if the trial court erred as to those three challenges for cause (and we make no finding that the trial court did so err), we do not believe that such would be grounds for reversal. The trial court granted eight of the State's thirteen challenges for cause as to prospective jurors. A reason for allowing the parties peremptory challenges is that reasonable minds can differ as to whether a particular prospective juror should be excluded for cause and to mitigate any harm that might otherwise be caused by a trial court's erroneously failing to strike for cause a prospective juror. The fact that, after striking eight jurors for cause at the State's instance, the trial court failed to strike three others, so that the State had to use three of its six peremptory challenges, does not appear to us to be likely to have caused any substantial prejudice to the State. In any case, the trial court has discretion to manage the selection of the jury, *e.g.*, *Carter v. Baham*, 95-2126 (La.App. 4 Cir. 10/9/96), 683 So.2d 299, and a review of the record of the jury selection as a whole does not reveal an abuse of discretion.

[10][11][12][13] The State's next argument on appeal is that some of the plaintiffs' claims are prescribed under La. R.S. 9:5624 because that statute provides a two-year prescriptive period for claims for "damage" to private property for public

purposes and the plaintiffs did not file suit until two and a half years after CFDS came on line. However, the statute relied upon by the State has no application to the present case. Specifically, La. R.S. 9:5624 applies only to cases in which private property **12 has been "damaged" *but not taken* by the State. *Greater Baton Rouge Airport Dist. v. Hays*, 339 So.2d 431 (La.App. 1st Cir.1976). *See also A.K. Roy, Inc. v. Board of Com'rs for Pontchartrain Levee Dist.*, 237 La. 541, 111 So.2d 765 (1959); *Powell v. Department of Highways*, 383 So.2d 425 (La.App. 4th Cir.1980); *Schneider v. Jefferson Parish*, 216 So.2d 604 (La.App. 4th Cir.1969). Nor is there any doubt that this is a "takings" case under La. R.S. 13:5111 which has a three-year prescriptive period. In fact, two prior published decisions of this court have held that this is a takings case. *See Avenal v. State*, 99-0127 (La.App. 4 Cir. 03/3/99), 757 So.2d 1; *Avenal v. State, Dept. of Natural Resources*, 95-0836 (La.App. 4 Cir. 11/30/95), 668 So.2d 1150. Factually, the key point as to why this is a "takings" case is that the plaintiffs' oyster leases have, under the normal full-flow operation of CFDS necessary to achieve its purposes, been rendered commercially non-viable as oyster leases and, because CFDS will be operated at its normal full flow on a permanent basis, the loss of commercial viability of the plaintiffs' oyster leases is permanent. When property has been rendered permanently non-usable for its only purpose, that is a taking. The facts that the State did not physically enter onto the plaintiffs' oyster leases, and that the CFDS was not constructed on the plaintiffs' oyster leases, are of no moment. *706 Nor is it of any significance that the plaintiffs continue to have the legal right to use the leased premises for oyster production. What is dispositive is that the State rendered the plaintiffs' oyster leases permanently useless for commercial oyster production.

[14] The State next argues that one of the class representative plaintiffs, Fox Oyster Company, was improperly awarded damages for leases which it managed but did not own. However, this is a class action, and Fox Oyster Company is one of the five class representatives. While all of the damages awarded must go

to the **13 actual owners of the oyster leases, that does not prevent Fox Oyster Company (which, in fact, does itself own many leases in the affected area) from serving as a class representative. The trial court can insure that damages are paid only to actual oyster lease owners.

The State also argues that the jury erred in its determination of the number of acres of oyster leases owned by each of the class representatives. The parties disputed these facts and presented evidence as to them. We do not believe that the jury was clearly wrong/manifestly erroneous in this regard. Therefore, we may not disturb the jury's determination. *See* *West Jefferson Levee Dist. v. Coast Quality Const. Corp.*, 93-1718 (La.5/23/94), 640 So.2d 1258; *LeJeune v. Union Pacific R.R.*, 97-1843 (La.4/14/98), 712 So.2d 491; *Lewis v. State, Through Dept. of Trans. Development*, 94-2370 (La.4/21/95), 654 So.2d 311.

[15] Lastly, the State argues that it is relieved of liability because the State inserted into the plaintiffs' oyster leases, when those leases were renewed, certain "indemnity clauses". The Supreme Court held in *Jurisich v. Jenkins*, 99-0076 (La.10/19/99), 749 So.2d 597, that such unilateral insertion by the State of onerous clauses in oyster leases is legally invalid. The State argues that the legislature amended the oyster lease statutes to allow the State to unilaterally insert onerous clauses upon the renewal of oyster leases. *See* 2000 La. Acts No. 107. However, without deciding whether that statute permits the indemnity clauses at issue, we note that the statutory amendment applies only to oyster leases renewed or extended after July 1, 1995. *Id.* The list of oyster leases offered by the State does not include leases dated after July 1, 1995. Therefore, the statutory amendment does not apply and, under the Supreme Court's *Jurisich*, decision the indemnity clauses at issue are invalid.

**14 For the foregoing reasons, the judgment the trial court is modified as to plaintiff Avenal and is otherwise affirmed.

AFFIRMED AS MODIFIED.

BYRNES, C.J., concurs in the reasons assigned by MURRAY, J.

LOVE, J., respectfully concurs in part and dissents in part.

TOBIAS, J., dissents and assigns reasons.

****1** MURRAY, J., concurs with reasons.

I write separately to further elaborate on the evidentiary support for the jury's damage award.

At trial, the plaintiffs introduced the testimony of two experts, Michael Voisin and Noel Brodtmann, Jr., who opined that the cultch currency matrix is the best method to calculate damages to an oyster lease. [FN1] Mr. Voisin, an oyster farming expert, ***707** explained that the matrix was originally developed in March 1996 for the Oyster Lease Damage Evaluation Board ("OLDEB") as a uniform system of compensating oyster lease holders for damages to their lease due to mineral (oil and gas) activities. It values oyster leases by determining the cost to replace lost or damaged leases. It does so by placing a value on the lease that varies depending on the type of lease substrate (foundation), *i.e.*, reef, shell, hard mud, or soft mud.

> FN1. "Cultch" is a hard material made up of crushed shells and limestone that is used to build a substrate (foundation) on muddy water bottoms of a lease. Cultch is essential to oyster harvesting because it creates a reef for spat (seed oysters) to attach onto and to grow.

According to Mr. Voisin, the State has extended the use of the matrix to the freshwater diversion project context, applying it in the Davis Pond Relocation Program. The Davis Pond Program provides for the exchange, relocation, or purchase of oyster

leases located within the Barataria Basin, which is the target area of the Davis Pond Freshwater Diversion Structure. *See* La. R.S. 56:432.1. For the Davis Pond Program, Mr. Voisin indicated that the matrix allows for 187 **2 cubic yards of cultch per acre of existing cultch or about 1.5 to 1.375 inches of cultch spread evenly across an acre. Mr. Voisin further testified that 1.375 inches of cultch is enough to plant seed oysters, yet the oyster industry recommends 3 to 6 inches of cultch to support full oyster growth. He still further testified that cultch costs about $38 per cubic yard if it is placed on water bottoms in less than 6 feet of water; yet for deeper water bottoms, the cost is $50 per cubic yard.

Mr. Brodtmann, an environmental consultant specializing in oyster assessments, testified that he conducted field assessments of some of the plaintiffs' leases using a poling procedure. The poling procedure involved moving across a lease area in a boat and probing the water bottoms with a cane pole every 8 to 10 feet. Based on the poling procedure, he determined the substrata characteristics of the water bottoms of the leases and classified them as reef, firm mud, or soft mud.

Mr. Brodtmann also testified, like Mr. Voisin, that an oyster reef must be a minimum of 3 to 6 inches thick in order to support an oyster habitat. He estimated that to build a 3-inch reef on an acre requires 403 cubic yards of cultch and costs $10,676; whereas, to build a 6-inch reef on an acre requires 806 cubic yards of cultch and costs $21,345. The latter figure, based on building a 6-inch reef, was adopted by the jury. In answering the jury interrogatory asking "[w]hat amount will fairly and adequately compensate the Plaintiff ... for the damages to his leases *per acre* of lease damaged?," the jury answered $21,345.

Further support for the jury's award is found in the trial testimony of the Secretary of the Department of Natural Resources, Jack Caldwell. On cross-examination, Secretary Caldwell acknowledged that in seeking federal aid for the

proposed Davis Pond Program he stated under oath at a February 1996 United States Congressional Committee Hearing that oyster leases in Plaquemines Parish were worth $7,000 an acre. He also acknowledged that in January 1999, he approved the OLDEB's adoption of the matrix as a uniform evaluation method **3 using 403 cubic yards of cultch as the estimated amount needed to build a 3-inch reef on an acre of water bottom. That estimate corresponds with Mr. Brodtmann's testimony.

Although there was contradictory expert testimony introduced by the state disputing the appropriateness of using the cultch currency matrix to value the plaintiffs' damages and estimating the average value of an oyster lease in Plaquemines Parish *708 before Caernarvon went on-line at $200 per acre, the jury obviously found the plaintiffs' experts' testimony more credible. As the Louisiana Supreme Court has held, "[c]redibility determinations, including the evaluation of and resolution of conflicts in expert testimony, are factual issues to be resolved by the trier of fact, which should not be disturbed on appeal in the absence of manifest error." *Lasyone v. Kansas City Southern R.R.*, 2000-2628, p. 13 (La.4/3/01), 786 So.2d 682, 693. I cannot say that the jury's resolution of the conflicting expert testimony presented at trial in this case was manifestly erroneous.

**1 LOVE, J., respectfully concurs in part and dissents in part.

I respectfully concur in that part of the majority opinion finding that the Caenarvon project resulted in a taking of certain oyster leases. I believe that the flood of water released by that project was as much a taking of the affected aquatic areas as the analogous situation of having one's property paved over in a state highway project on land or having one's land flooded by the creation of a spillway. Had these waters been released on dry land there would have been no question of a taking. Consequently, the prescriptive period is three years and the affected oyster owners are entitled to compensation.

However, I respectfully dissent from those portions of the majority opinion calculating damages. Just as Judge Landrieu stated in his dissent in *Inabnet v. Exxon Corp.*, 614 So.2d 336 (La.App. 4 Cir.1993), the ramifications of the damages awarded by the trial court in the instant case "shock the conscience."

The Supreme Court reversed and remanded *Inabnet* in part (presumably influenced by Judge Landrieu's dissent), *Inabnet v. Exxon Corp.*, 93-0681 (La.9/6/94), 642 So.2d 1243, 1256, stating, *inter alia,* that:

> Because the parties may have been misled in this regard [the measure of damages] by previous intermediate court decisions, **it is appropriate to remand** the case to the district court for further evidence and for a decision on this issue. On remand, the court should consider not only the rental price of the lease, but also the money, time and **2 effort expended by the lessee in developing the lease, the availability of comparable leases, and other relevant factors. [Emphasis added.]
>
> *Id.*

The Supreme Court opinion in *Inabnet* stated that the measure of damages was "the value of plaintiff's leasehold interest before and after the dredging," which in terms of the instant case would mean the value before and after the fresh water diversion. *Inabnet*, 93-0681 (La.9/6/94), 642 So.2d 1243, 1256. In this type of situation, loss of value cannot mean replacement cost or restoration cost. As was pointed out in the Supreme Court decision in *Inabnet*, at p. 21, 642 So.2d at 1256, the oyster lessees have no "personal" reason for restoring the water bottoms to their original condition, i.e., nothing that could be likened to nonpecuniary damages under La. C.C. art.1998. Therefore, replacement or restoration cost is not the measure of damages.

Loss of profit is probably the fairest measure of damages. This is sufficient to satisfy the Constitutional mandate that the "owner shall be compensated to the full extent of his loss."

The oyster leases are investments. The only proper measure of damages is the economic loss suffered by the lessee and that would normally be the present value of the loss of future **net** income and the present value of the loss of future return ***709** of capital suffered by the lessee. The time, money and effort expended by the lessee in developing the lease should be considered, but only to the extent they added value to the leasehold. The oyster lessees should not be able to recover any items of damage, which are not recognized as having economic value in the market place.

The plaintiffs rely on *State Through Dept. of Highways v. Constant*, 369 So.2d 699, in support of their contention that they are entitled to the restoration costs of the oyster leases. *Constant* does not support that argument. In *Constant* ****3** the issue was the expropriation of the loading and parking area of a marina. The Supreme Court in *Constant* found that the mere market value of the property expropriated did not make the owner economically whole because: "Without the replacement of their loading area, their marina business operations will be substantially destroyed." *Id.*, at 702. In *Constant* the value of the expropriated land alone would not compensate the owner for the adverse economic effects of the loss of that land on his business, which the expropriated land serviced. The plaintiffs in this case have demonstrated no such collateral economic damage.

Just as the Supreme Court found in *Inabnet, supra,* the jurisprudence is still murky regarding the calculation of damages to oyster leases and this case should be remanded to the district court as was done in *Inabnet,* in order to apply the proper standard of damages.

A large number of the oyster leases contained indemnity provisions. Pursuant to a motion for summary judgment, the Department of Natural Resources asked the trial court to rule on the indemnity clauses. The trial court failed to do so. This Court previously ruled that the failure of the trial court to rule on the

indemnity provisions was error. The trial court refused to grant a new trial on this issue. The Department of Natural Resources sought supervisory review of the trial court's action in this regard on March 16, 2001. 2001-C-0542. On May 22, 2001, this Court consolidated that writ with this appeal. This case should be remanded for a ruling by the trial court on each indemnity agreement pursuant to the previous order of this court.

It was also error for the trial court to exclude the State's side-scan sonar evidence. While this error alone might not warrant a remand, when coupled with the other errors discussed herein, this error only serves to reinforce the decision to remand.

**4 For the forgoing reasons, I would affirm that portion of the trial court judgment finding that a taking had occurred, but I would remand for the admission of the State's side-scan sonar evidence and recalculation of the damage award.

**1 TOBIAS, J., dissents and assigns reasons.

I respectfully dissent. In my view, the majority errs in its reading and interpretation of our earlier decisions in this case, addressing the issue of whether there was a "taking" by the State. Because I find that a "taking" as defined by our law and jurisprudence did not occur, I find that this case is prescribed. I would therefore not address the other assignments of error that go to the merits. My reasoning follows.

In this class action suit, the defendant, the State of Louisiana, through the Department of Natural Resources ("DNR"), appeals a trial court judgment rendered in favor of the plaintiffs, a group oyster fishermen holding oyster leases on water bottoms owned by the State in Plaquemines *710 and St. Bernard Parishes, awarding them damages for the "taking" of their leases as a result of the Caernarvon Freshwater Diversion Structure. [FN1] Plaintiff, Albert J. Avenal, Jr. ("Avenal"), also appeals from the judgment. In addition to Avenal, the other class **2

representatives in the litigation are Clarence Duplessis ("Duplessis"), Kenneth Fox ("Fox"), Fox Oyster Company, and Nick Skansi ("Skansi").

> FN1. The Caernarvon Freshwater Diversion Structure is a multi-purpose structure consisting of five concrete culverts each measuring 15 feet by 15 feet with metal gates that are raised and lowered as needed. The structure connects the Mississippi River to the marshes of Breton Basin by a canal. When the gates are raised, fresh water and suspended sediment from the river flow through the canal into the basin.

Facts, History, and Evidence

The factual and procedural history of this case follows. [FN2]

> FN2. In addition to the evidence in the record before us, the factual and procedural history is taken from the decisions in *Avenal v. United States*, 100 F.3d 933 (Fed.Cir.1996); *Avenal v. United States*, 33 Fed. Cl. 778 (1995); and *Avenal v. State*, 99-0127 (La.App. 4 Cir. 3/15/00), 757 So.2d 1, *cert. denied*, *Louisiana Dept. of Natural Resources v. Avenal*, 531 U.S. 1012, 121 S.Ct. 568, 148 L.Ed.2d 486 (2000).

In Louisiana, the diversion of fresh water from the Mississippi River has long been used for a variety of purposes, including the creation of new land, the prevention of coastal erosion, and the enhancement of oyster production. Historically, oyster fishermen in Louisiana have used freshwater diversions to allow river water laden with nutrients to flow into their oyster beds to reduce the salinity and thus render the water conditions unfavorable for saltwater predators such as black drum fish and oyster drills, as well as parasites and diseases.

Freshwater diversion became particularly important for the oyster industry after 1927 when the Mississippi River levee system was enhanced for navigation and flood prevention purposes. However, the construction of additional and larger levees prevented river water from reaching adjacent estuaries and the oyster beds located therein on both sides of the Mississippi River. Consequently, these areas continued to become more saline; the salinity killed the plant life that held the soil together. This, in turn, accelerated erosion, which was no longer being offset by the replenishing of land by suspended sediment from the river. As the land eroded, the saltwater intrusion from the Gulf of Mexico continued further inland. In response, the oyster fishermen relocated their oyster beds farther inland away from **3 encroaching saltwater predators and disease, but closer to the sources of manmade pollution.

To address the adverse environmental conditions in the Breton Sound [FN3] estuary within Plaquemines Parish, various structures and outlets were gradually constructed in the levee system along the east bank of the Mississippi River to allow river water to enter the Breton Sound estuary. In addition to the Bohemia Spillway south of Point-a-la-Hache in Plaquemines Parish, constructed in 1925, other freshwater diversion structures included Bayou LaMoque and White Ditch Siphon, constructed by the State of Louisiana in 1956 and 1964, respectively.

> FN3. Breton Sound is an estuarine basin consisting of approximately 676,000 acres, of which 492,000 acres are water bottoms.

In 1965, the United States Congress passed the Flood Control Act, Pub.L. No. 89-298, 79 Stat. 1037 (1965), which authorized construction of freshwater diversion structures at Caernarvon, Louisiana, and *711 other locations in the Breton Basin. Thereafter, public hearings were held for several years involving various governmental agencies and oyster fishermen. In 1983, the Louisiana Department of Wildlife and Fisheries ("DWF"),

which is part of the DNR, published a report setting forth optimal salinity regimes for oyster production on public seed grounds in the Breton Basin.

In 1984, the United States Army Corps of Engineers ("Corps") prepared an environmental impact statement suggesting locations of target salinity concentrations (isohalines) at three areas along the southeast Louisiana coast to enhance fisheries and to combat coastal erosion. To create optimal salinity regimes, the environmental impact statement proposed the construction of three freshwater diversion structures in the three areas: (1) the Bonnet Carre Spillway in **4 the Lake Pontchartrain Basin; (2) the Davis Pond Freshwater Diversion Structure in the Barataria Basin; and, (3) the Caernarvon Freshwater Diversion Structure in the Breton Basin. The Caernarvon project, in particular, was designed to abate saltwater intrusion and marine tidal invasion, while promoting coastal restoration and enhancing fisheries and wildlife in the basin. The DNR and DWF set optimal target salinity zones in Breton Sound, which ranged from 5 parts per thousand ("ppt") for the northwest inland area of the basin to 15 ppt for the lower seaward end of the basin. The salinity zones were based upon the fact that below 5 ppt, oysters become stressed and die, while above 15 ppt, oysters are subject to saltwater predators and disease. The optimal salinity regime targeting annual average isohalines in concentration between 5 ppt and 15 ppt allowed oyster propagation and cultivation to continue in an existing zone within Breton Sound, while at the same time fostered coastal restoration by freshening the upper Breton Basin and allowing vegetation to return in an area where little active oyster production was occurring. Eventually the Caernarvon Interagency Advisory Committee ("CIAC") proposed a management plan for the Caernarvon Freshwater Diversion Structure using salinity zones as well as other environmental considerations.

In 1984, Plaquemines Parish hired Dr. Johannes Van Beek of Coastal Environments, Inc., to conduct a study to determine the

potential effects of the proposed Caernarvon Freshwater Diversion Structure. Dr. Van Beek projected that, after Caernarvon went on-line, 35,000 acres of land near the structure would have salinities below 2 ppt, concluding the area would become freshwater marsh. **5 Dr. Van Beek also projected that an additional 31,000 acres would have salinities between 2 ppt and 5 ppt and eventually develop into intermediate marsh.

In connection with public announcements, public hearings, and governmental environmental impact studies in the latter 1970's, the 1980's, and early 1990's, the Louisiana and federal governments informed the public, including the oyster industry, of the proposed freshening of the upper Breton Basin and the likelihood of adverse affects upon oyster leases located in areas that had been historically fresh prior to 1960. In a letter dated 26 October 1990 to Mr. Kell McInnis, Acting Secretary of the DWF, Bill Good, Ph.D., Acting Administrator of DNR's Coastal Restoration Division and Chairman of the CIAC, expressed concern that oyster leases within the Caernarvon structure's intended impact area might be adversely affected by the freshwater diversion flow. Thus, Dr. Good and the CIAC requested that the DWF allow the oyster leaseholders to relocate their oysters to areas outside the impact zone.

*712 In response, the DWF informed the CIAC by a memorandum dated 7 November 1990 that an oyster "relay" operation would take place under the direction of the DWF and Louisiana Department of Health and Hospitals ("DHH"). The memorandum stated, in part:

> While the particulars of the [Caernarvon] diversion scheme are debatable, the need for controlled supplemental fresh water input to the area is not. Saltwater intrusion has claimed and continues to threaten vast acreage of fresh, brackish and intermediate marshes. The Department recognizes that the diversion plan would not eliminate swamp and marsh loss, but it would significantly reduce the rates of loss throughout the basin. The instability of salinity conditions which now exist in

the area has contributed to the inconsistency of commercial and recreational fisheries production and has also magnified the effects of occasional floodwater and domestic pollution. As saltwater intrusion progressed, **6 the zone of favorable salinities for oyster production moved landward and away from the vast, historically productive reefs and firm water bottoms. The proposed freshwater diversion would shift the zone of greatest productivity back to the greatly superior reef areas which are much less affected by floodwater and pollution.

The Department is aware that certain fisheries resources could be displaced, however, we firmly believe that the increase in overall productivity of the area, along with increased utilization of existing resources, will result in real benefits to the vast majority of interest.

In regards to assisting the state in any mitigative damages resulting from the operation of the structure, the Department is prepared to compensate oyster fishermen whose oyster leases are adversely affected by the operation of the structure, in five years, by the relocation of oyster leases out of the area on an acre for acre basis at that time. The lessee would have to document these damages to obtain a lease relocation. Any such relocations would be restricted to areas designated for leasing in the vicinity.

LDWF, along with DHH is allowing oyster lease holders, south of the Caernarvon Freshwater Diversion Structure out to the Tennessee Gas Pipeline (Double pipeline) an opportunity to relocate oysters which may be affected by the operation of the structure.

The relay, known as the Caernarvon Oyster Transfer, was conducted from 3 through 7 December 1990, and allowed oyster lessees with productive oyster leases, who obtained a relay permit and posted a $1,000.00 performance bond, to move their oysters from the potential Caernarvon impact area to pre-designated lease sites outside the impact zone. Some oyster lessees chose to participate in the transfer; others did not.

Several months prior to the Caernarvon Freshwater Diversion Structure going on-line, the Corps conducted several hydrologic computer simulations of the structure's proposed operation to determine the potential effects of the freshwater diversion on the salinity levels in the basin. Based on the simulations, Domingo J. Elquezabal, the Corps' Senior Project Manager for the Caernarvon structure, sent a **7 letter on 19 June 1991 to Dr. Good, stating that, "a month long diversion of 5,000 cfs [cubic feet per second] would cause serious detrimental effects on the area fisheries, especially oysters."

Meanwhile, in February, March, and April of 1991, significant oyster mortality occurred in the Breton Basin as a result of *713 elevated temperatures and a freshet, a period of significant freshwater intrusion from heavy rains, the Mississippi River's overflow, and other freshwater sources around Breton Sound. By August of 1991, oyster mortality levels had reached 75% to 100% on many privately leased oyster beds within the Breton Sound estuary. Several oyster fishermen claimed that the mortality was a result of the Caernarvon freshwater diversion; however, at the time, the Caernarvon Freshwater Diversion Structure *had not yet* gone on-line. The following month, in September 1991, the Caernarvon Freshwater Diversion Structure went on-line and operated for the remainder of the year at a minimal flow due to the existing oyster mortality. Nonetheless, after the 1991 freshet, the oyster lessees never experienced the "bloom" or abundant oyster harvest that historically followed a freshet. Also, Hurricane Andrew hit the Louisiana coast in 1992 and adversely affected the oyster industry.

On 29 March 1994, the plaintiffs filed the instant suit in the Twenty-Fifth Judicial District Court for the Parish of Plaquemines on behalf of all persons holding oyster leases on state-owned water bottoms in Breton Sound, asserting that their oyster leases were destroyed or damaged because of the intrusion of fresh water from the Mississippi River by the Caernarvon Freshwater Diversion Structure. They asserted that the structure

was authorized, constructed, funded, **8 and operated by the State through the DNR. The plaintiffs further asserted that the State's action, i.e., the lowering of salinity levels of the water in Breton Sound below that necessary to support oyster cultivation, "has resulted in a permanent and substantial interference with plaintiffs' use and enjoyment of their land amounting to a taking of an interest in [their] property rights without compensation in violation of Article I, § 4 of the Louisiana Constitution...."

On 24 April 1994, the plaintiffs also filed suit in the United States Court of Federal Claims against the Corps, which designed, financed, and built the Caernarvon Freshwater Diversion Structure. In that suit, the plaintiffs alleged a "taking" under the Fifth Amendment to the United States Constitution and sought class certification.

In the federal suit, the Corps moved for summary judgment, which the Court of Federal Claims granted in August of 1995, concluding that the plaintiffs had no compensable expectancy in the continued artificially elevated salinity levels caused by the Mississippi River levee system in historically freshwater marsh areas within Breton Sound. *Avenal v. United States*, 33 Fed. Cl. 778 (1995). On appeal, the United States Court of Appeals, Federal Circuit, affirmed the decision for different reasons. *Avenal v. United States*, 100 F.3d 933 (Fed.Cir.1996). The federal appeals court held that the oyster lessees could not have had "reasonable investment-backed expectations" that their oyster leases would give them rights protected from the planned freshwater diversions authorized by the federal and state governments.

Following the decision of the United States Court of Appeals, Federal Circuit, the DNR filed a motion for summary judgment in this state action, arguing **9 that collateral estoppel barred the re-litigation of the "takings" issue already decided by the federal courts. The trial court denied the motion. The DNR sought review of that ruling from this Court. In a 3-2 decision, the

majority concluded that genuine issues of material fact existed as to whether the impact of the State's actions on the plaintiffs' oyster leases constituted an inverse condemnation and a "taking" pursuant to *714Article I, § 4 of the Louisiana Constitution of 1974 and remanded the matter to the district court for further proceedings. *Avenal v. State*, 99-0127 (La.App. 4 Cir. 3/3/99), 757 So.2d 1, *cert. denied*, 531 U.S. 1012, 121 S.Ct. 568, 148 L.Ed.2d 486 (2000).

In the meantime, on 15 December 1998, the plaintiffs moved to strike all evidence, testimony, and argument regarding hold harmless clauses contained in the oyster lease agreements. The DNR, in turn, filed a motion for partial summary judgment seeking the dismissal of many class members' claims based on the validity of a hold harmless clause inserted into every oyster lease agreement issued from 1989 through 1995, which stated:

> This lessee hereby agrees to hold and save the State of Louisiana, its agents or employees, free and harmless from any claims for loss or damages to rights arising under this lease, from diversions of fresh water or sediment, depositing of dredged or other materials or any other actions, taken for the purpose of management, preservation, enhancement, creation or restoration of coastal wetlands, water bottoms or related renewable resources; said damages to include, but not to be limited to, oyster mortality, oyster disease, damage to oyster beds or decreased oyster production, due to siltation, pollution or other causes.

The DNR also argued that the Coastal Wetlands Restoration Advisory clause and the Allocation of Risk and Liability, and Indemnification clause, both of which **10 were inserted into every oyster lease agreement issued as of 1996, also precluded the plaintiffs' from asserting their claims for damages against the State.

Contemporaneously, the DNR filed a motion to close, decertify or, alternatively, redefine the class. [FN4] The trial court granted the plaintiffs' motion in limine excluding all evidence relating to

the hold harmless provisions contained in the plaintiffs' leases and denied the DNR's motion to close, decertify, or redefine the class. As to the DNR's motion for partial summary judgment, the trial court deferred ruling on the validity of the hold harmless and indemnity provisions until "after the jury's findings."

> FN4. Earlier, the plaintiffs moved for class certification, which motion the trial court granted in August 1996. This court's judgment upholding the class certification became final when the Louisiana Supreme Court denied the State's writ application in *Avenal v. State, Dept. of Nat. Resources*, 97-2747 (La.1/16/98), 706 So.2d 979.

The DNR sought review of the trial court's rulings, filing a writ application with this Court. A three-judge panel of this court denied in part and granted in part the writ application. The majority found no error in the trial court's grant of the plaintiffs' motion in limine to exclude all evidence of the hold harmless provisions. One judge dissented, in part, finding such evidence was relevant and admissible pursuant to the La. C.E. arts. 401-403. All judges, however, agreed that the trial court erred in deferring to rule on the motion for summary judgment and held that it had to either grant or deny the motion at least ten days before trial, citing La. C.C.P. art. 966(D). [FN5] Nonetheless, the trial court failed to rule on the motion for summary judgment prior to trial. [FN6]

> FN5. *Avenal v. State, unpub.*, 99-0317 (La.App. 4 Cir. 12/15/00).

> FN6. This issue is discussed further in a footnote *infra*.

At trial, the four individual class representatives testified that after the Caernarvon Freshwater Diversion Structure went ***715** on-line in September 1991 their ****11** private leases within the Breton Basin no longer produced oysters. They attributed the lost production to an increase in sediment and vegetation,

specifically eurasian water milfoil, as a result of the inundation of fresh water into the basin. The dense eurasian water milfoil, according to the plaintiffs, prevented their boats from reaching their respective leases.

The plaintiffs also testified that their private leases were adversely affected by the Caernarvon Freshwater Diversion Structure's effect on the DHH's "closure lines." [FN7] Prior to the diversion, the closure line in the Breton Basin fluctuated several times during the year, moving from the coastline southeast to the Gulf of Mexico during fresher periods (the winter months) and back again when salinity levels increased (the summer months). The plaintiffs testified that due to the closure line's fluctuation, their private leases located within the closed area might be suitable for harvesting once the closure line moved. They further testified that after the Caernarvon diversion, however, the closure line gradually moved southeast towards the Gulf of Mexico and never fluctuated back. As a result, the plaintiffs claimed their private leases were permanently within the closed area and off-limits for harvesting.

> FN7. The closure line is the boundary designated by the DHH that delineates safe areas, where oyster harvesting may take place, from unsafe areas where it is prohibited. The line, based on the water's historical fecal coliform (fecal bacteria) content, fluctuates during the year. During winter months, the northwest winds push the salt water in the estuary out toward the Gulf of Mexico, while in the summer, south winds and high tides from the gulf push the salt water inland. Generally, fresh water attracts nutria, other animals, and live organisms, which deposit waste, producing higher fecal bacteria populations.

Michael Voisin, Chairman of the Louisiana Oyster Lease Task Force, [FN8] member of the Oyster Lease Damage Evaluation Board [FN9] ("OLDEB"), and the **12 plaintiffs' *716 expert in oyster farming, corroborated the plaintiffs' claims of

permanent damage to the private oyster leases due to the freshwater diversion. In estimating damages to private oyster leases as a result of coastal restoration and oil and gas activities, Voisin explained that the OLDEB employs an Oyster Lease Valuation Matrix, also known as the "cultch currency matrix." The matrix was developed jointly by the Governor's Office of Coastal Activities, the DNR, and the DWF in March 1996 at a two-day workshop hosted by the DNR and attended by environmental scientists, oyster biologists, and representatives from the oyster **13 industry, oil and gas industry, and state and federal agencies. Voisin testified that "cultch," a hard material composed of limestone and crushed shells, is used to build a hard substrate on soft, muddy water bottoms. Cultch is vital to oyster productivity because it creates the reef necessary for seed oysters to attach to and grow. Voisin explained that the matrix values an oyster lease based on the cost to replace the lost or damaged lease and places a different value on the various classifications of substrate, *e.g.*, reef, shell and mud, firm mud, and soft mud.

FN8. Pursuant to La. R.S. 56:421, the Louisiana Legislature established the Oyster Task Force to study and monitor the molluscan industry and to make recommendations for the maximization of benefit from that industry for the state of Louisiana and its citizens.

FN9. Pursuant to La. R.S. 56:700.10, *et seq.* (1995), the Louisiana Legislature formed the OLDEB as an arm of the DNR *to arbitrate conflicts between mineral owners and oyster leaseholders* to effect an equitable solution to the problem which will result in fair and predictable treatment to the oil and gas industry while assuring the oyster fishermen actual compensation for damages to their oyster beds due to mineral activities. The OLDEB is authorized to promulgate rules and regulations to determine the method of establishing a uniform system of compensation for actual damages caused to the beds of leaseholders by oil and gas activity based on biological

test data. As to the duties of the OLDEB, La. R.S. 56:700.13 provides in part:

C. The board shall develop a list of qualified biologists to provide biological test data in determining the quality, condition, and value of oyster beds and grounds. The secretary, in conjunction with the board, shall develop a list of qualifications for these biologists. When an owner of an oil and gas activity is required by the provisions of R.S. 56:700.12(3) to perform a biological survey under this Part, he shall be required to choose a biologist from the list of qualified biologists provided by the board. The board shall provide the owner of the oil and gas activity a list of three names from this list, and the owner of the oil and gas activity may choose any of the names so provided to conduct the survey. The secretary, in conjunction with the board, shall adopt rules providing for a regular rotation of this list so that each of the listed qualified biologists is available for selection on a regular basis.

D. The board members shall evaluate the information regarding damage to the beds and make the final determination in awarding damages to claimants. The secretary, upon receiving this determination of damages, may reject the damage award and send the matter back to the board. The board may then either revise the damage award or, by a two-thirds vote, affirm the original damage determination. If the board fails to either revise the damage award or affirm the original damage determination, the arbitration process provided in this Part shall conclude without a final determination of damages.

E. The determination of damages by the board shall be based on the values shown in the biological survey and shall reflect true and actual damages.

According to Voisin, the State has used the cultch currency matrix formula in the Davis Pond Relocation Program [FN10]

to exchange, relocate, or purchase private oyster leases located within the Barataria Basin, the target area of the Davis Pond Freshwater Diversion Structure. As applied to the Davis Pond oyster lessees, the matrix allows for 187 cubic yards of cultch per acre of existing cultch, or approximately 1.5 to 1.375 inches of cultch evenly spread across an acre. Voisin testified that 1.375 inches of cultch is sufficient to plant seed oysters, but the oyster industry recommends 3 to 6-inches of cultch to support full oyster growth. He estimated that 400 to 800 cubic yards of cultch would be needed to build a 3 to 6 inch reef across an acre. As to cost, Voisin testified that cultch is approximately $38.00 per cubic yard if it is to be placed on water bottoms in less than 6 feet of water and approximately $50.00 per cubic yard for water bottoms deeper than 6 feet. The cost differential, he explained, is attributed to the size and weight of the vessels employed in laying the cultch.

> FN10. Pursuant to La. R.S. 56:432.1, the DNR developed the relocation program to reduce and offset the potential adverse impact of the Davis Pond Freshwater Diversion Structure, whose projected operation date was June 2002.

**14 The plaintiffs also offered the expert testimony of Noel V. Brodtmann, Jr., an environmental consultant who specializes in oyster assessments, to corroborate their claims that the Caernarvon freshwater diversion damaged their oyster leases. In his opinion, the freshwater diversion transformed the ecology of the Breton Sound estuary from a brackish environment that sustained intense oyster growth to a totally freshwater environment incapable of such. Brodtmann agreed that since the Caernarvon Freshwater Diversion Structure went on-line, the DHH seasonal closure line had permanently moved southeast towards the Gulf of Mexico. He attributed the lack of an oyster bloom in the estuary following the 1991 freshet to *717 an "over-freshening" by the Caernarvon freshwater diversion in the latter part of 1991. Brodtmann concluded that freshwater

diversions from Bohemia Spillway, White Ditch Siphon, and Bayou LaMoque had very little effect on the Breton Sound estuary because they had been in operation years before the Caernarvon Freshwater Diversion Structure, yet never adversely affected the oyster populations. He also concluded that Hurricane Andrew in 1992 had little impact on the oyster beds east of the Mississippi River even though it heavily damaged oyster beds located west of the river in Lafourche and Terrebonne Parishes.

Referring to the Caernarvon diversion's flow patterns, Brodtmann explained that the structure operated at a minimal flow of less than 1,000 cubic feet per second ("cfs"), when it initially went on-line, and peaked in the third quarter of 1992 at 4,000 cfs. It fell during the first quarter of 1993 and increased to 12,000 cfs in the second quarter of 1993, but operated at that rate for only two days. Flow dropped to 582 cfs in the final quarter of 1993 and then increased to 8,000 cfs in January 1994, where it remained until October 1997. Brodtmann noted that higher **15 rates of oyster mortality and the increased presence of eurasian water milfoil in the basin correlated with peak flow periods, but a resurgence of oyster spat [FN11] and young oysters appeared in the area shortly after the DNR shut off the freshwater flow in October 1997. Brodtmann opined that the DNR's proposed plan to operate Caernarvon at 8,000 cfs for intermittent two-week periods beginning in 2001 would permanently destroy all oyster populations on the leases.

FN11. Oyster spat consists of seed oysters.

To estimate the extent of the plaintiffs' losses, Brodtmann conducted field assessments of some of their leases. In addition to maps and surveys provided by the DWF, he used global positioning system ("GPS") data to locate the specific oyster leases. He then "poled" the leased areas to ascertain the substrata characteristics of the water bottoms. The poling procedure entailed probing the water bottoms with a cane pole every eight

to ten feet while moving across the leased area in a boat. Brodtmann then classified his findings as reef, firm mud, or soft mud. Poling also helped locate the accumulation of live oysters on a lease surface.

According to Brodtmann, an oyster reef should be at least 3 to 6 inches thick to support an oyster habitat. Like Voisin, he concluded that the cultch currency ~~matrix~~ used by the OLDEB was the best method to calculate damages to an oyster lease. He testified that 403 cubic yards of cultch are needed to build a 3-inch reef on an acre at a cost of $10,676.00 and 806 cubic yards of cultch are needed for a 6-inch reef on an acre at a cost of $21,345.00. The plaintiffs' expert, Randy Rice, Ph.D., an economics professor at Louisiana State University, verified that applying the cultch currency matrix with figures provided to him by the plaintiffs' counsel, **16 806 cubic yards of cultch at a total cost of $21,345.00 are needed to build 6-inch reef across an acre of water bottoms.

On the cross-examination of Jack C. Caldwell, Secretary of the DNR, the plaintiffs elicited testimony from him that he had testified at a United States Congressional Committee Hearing in February 1996, seeking to obtain federal assistance for the proposed oyster lease relocation program in connection with the Davis Pond Freshwater Diversion Structure, and stated under oath that oyster leases in Plaquemines Parish were worth $7,000.00 per acre. Secretary Caldwell also acknowledged *718 that in January 1999 he had approved the OLDEB's adoption of the uniform evaluation method that used 403 cubic yards of cultch as the estimated amount needed to build a 3-inch reef on an acre of water bottoms.

Prior to trial the plaintiffs filed a motion in limine to exclude all evidence and testimony regarding the biological assessments and side scan sonar surveys [FN12] conducted by DNR's expert witnesses, Charles A. Wilson, Ph.D., and Harry H. Roberts, Ph.D., experts in estuarine ecology and geography, respectively,

at the LSU Coastal Studies and Fisheries Institute. The DNR intended to introduce the side scan sonar surveys to prove the amount of reef on the individual plaintiffs' oysters leases and to refute the claim that an acre of leased water bottoms contained at least 403 cubic yards of cultch. During the course of trial, without the **17 jury present, the trial court conducted a *Daubert* [FN13] hearing to consider the plaintiffs' motion.

> FN12. Side scan sonar is the application of hydroacoustic technology to delineate or "map" subtidal oyster reefs from adjacent water bottoms. Hydroacoustic surveys allow scientists to investigate in detail a water bottom's topographic features and textural patterns, which provide evidence of the estuarine sedimentation processes operating on an oyster reef. The surveys also identify evidence of damage to oyster reefs associated with activities such as marine transportation, seismic surveys, oil and gas exploration, and dredging. Generally, side scan sonar is used in conjunction with ground truthing (poling) for the most accurate quantification of reef on an oyster lease.

> FN13. The United States Supreme Court established criteria for the admissibility of expert testimony in general and expert scientific testimony in particular in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Louisiana Supreme Court adopted the standards set forth in *Daubert* in *State v. Foret*, 628 So.2d 1116 (La.1993).

Although Drs. Wilson and Roberts testified extensively regarding the side scan sonar methodology, the trial court granted the plaintiffs' motion. Construing side scan sonar and ground truthing as two distinct methodologies, each used independently of the other, the trial court concluded that ground truthing contradicted side scan sonar findings. The trial court also determined that the side scan sonar methodology had never been

published or peer reviewed and its results were subject to a 400 percent rate of error. [FN14]

> FN14. The DNR proffered the *Daubert* hearing evidence at the close of trial and, in this appeal, assigns as error the trial court's granting of the plaintiffs' motion to exclude the side scan sonar evidence. The proffered evidence and other evidence in the record discloses that the application of the cultch currency matrix for the purposes of estimating damages to an oyster reef entails the use of both side scan sonar and ground truthing. Both side scan sonar and ground truthing are generally accepted in the scientific community in estimating aquatic habitats. Although both methodologies have a rate of error, when used in conjunction with each other, the methodologies have a 90% accuracy rate. Insofar as the trial court allowed the plaintiffs to admit evidence of the application of the cultch currency matrix by the OLDEB and ground truthing by Brodtmann to prove the amount of their damages, it also should have allowed into evidence the DNR's side scan sonar surveys. I note that by granting the plaintiffs' motion in limine to exclude the side scan sonar evidence, the trial court erred.

Nonetheless, to counter the plaintiffs' claims that the freshwater diversion from the Caernarvon structure was the sole cause of substantial damage to all oyster leases within the Breton Sound estuary, the DNR offered a plethora of scientific evidence. William Joseph Wiseman, Jr., Ph.D., an expert in physical oceanography and hydrology, testified extensively regarding the temperatures, salinity levels, currents, tidal waves, and mixing processes of the waters in the Breton Sound estuary. ***719** According to Dr. Wiseman, the Corps conducted a dye study in August 1991 in which dye and water were released from the Caernarvon ****18** Freshwater Diversion Structure and tracked for a four-day period. The dye acted as a tracer only and had no affect on the water's flow. Once released, the dye followed two

paths. Some of the dye descended from the structure and flowed eastward into Lake Leary, where it diffused and could no longer be tracked. The remainder descended to Bayou Manuel and entered River Aux Chenes on the western side of the Breton Basin. At the time of the study, mild winds from the east blew the dye to the west.

However, Dr. Wiseman also reviewed satellite images of the earth's surface taken in March 1989 and January and May 1994 using Advanced Very High Resolution Radiometer ("AVHRR"). The pictures, he testified, reflected the amount of suspended sediment in the water based on the direction of the wind at that time. From the pictures, Dr. Wiseman concluded that fresh water from Caernarvon flowed from the upper northwest area of the Breton Basin southeast to the lower end and remained within the natural boundaries of River Aux Chenes to the west and Bayou Terre Aux Boeufs to the east, regardless of the direction of the wind. He explained that the freshwater had a dominant effect only on the salinity levels in the very northwest area of the Breton Basin, and the further it flowed southeast away from the structure its effect lessened. Dr. Wiseman also testified that it had no effect in areas of the Breton Basin west of River Aux Chenes and east of Bayou Terre Aux Boeufs.

Unlike Brodtmann, Dr. Wiseman found that the other freshwater diversion structures along the Mississippi River, south of Caernarvon, greatly influenced the salinity levels in the upper Breton Basin. According to him, the southeast winds during the spring, summer, and early fall blew significant amounts of fresh water **19 into the upper Breton Basin. Dr. Wiseman also testified that in addition to winds, tidal waves, rainfall, and temperature also affected the salinity levels of the waters in Breton Sound.

Dr. Good corroborated Dr. Wiseman's testimony that several factors affected the salinity levels within the Breton Sound estuary, which in turn influenced the DNR's operational plan for

the Caernarvon structure. He testified that initially the DNR operated the structure at a minimal flow due to the high oyster mortality as a result of the 1991 freshet. In August 1993, the DNR decided to increase the flow in January 1994 to 8,000 cfs. Although this plan remained in effect until November 1997, Dr. Good demonstrated that often the water did not flow at 8,000 cfs because the water level of the Mississippi River was too low. He also testified that in November 1997, the DNR reduced winter diversions from 8,000 to 4,000 cfs and from 3 to 2.5 weeks. And in January 2001, the DNR would implement a "pulsing" operation, increasing the flow to 8,000 cfs for intermittent two-week periods.

Dr. Good noted that as a result of the freshwater diversion from the Caernarvon Freshwater Diversion Structure since 1991, the marsh increased 5.9% annually. This increase, he testified, was not the result of large sediment deposits, but rather the result of freshwater nutrients stimulating marsh vegetation growth. According to Dr. Good, approximately 2,000 truckloads of sediment passed through the Caernarvon Freshwater Diversion Structure in November and December 1991, yet most of it settled in Big Mar, the large body of water near the structure that acted as a sediment trap. He explained that the sediment diverted from the structure ***720** deposited within 7.7 miles of the Caernarvon structure. Dr. ****20** Good characterized as sediment "plume" or nutrient laden sediment any suspended sediment found in the water beyond the 7.7-mile radius. He opined that it was impossible to determine the origin of sediment found in the Breton Sound estuary, explaining that sediment on public seed grounds 24 miles from the Caernarvon Freshwater Diversion Structure could have come from freshwater diversion projects south of Caernarvon such as Bayou LaMoque.

According to Dr. Good, prior to Caernarvon's construction, saltwater intrusion from the Gulf of Mexico destroyed 50,000 acres of oyster supporting water bottoms. The public seed grounds, on which all oyster farmers depended, were nearly

obliterated. After the Caernarvon freshwater diversion, oyster productivity on public seed grounds *increased* 300%. Dr. Good also noted that the reduction in the flow of the fresh water in November 1997 correlated with a decrease in oyster production from the public seed grounds in 1998. Nonetheless, he concluded that all oyster fishermen benefited from the Caernarvon's fresh water flow.

Kenneth W. Hemphill, Sr., the DHH's administrator of the shellfish and mollusk program, testified, contrary to the plaintiffs' claims, that the Caernarvon freshwater diversion alone had little impact on the DHH's seasonal closure lines. He attributed the directional changes in the seasonal closure line to the amount of rainfall, the extent of drought, and temperature fluctuations in the Breton Sound estuary.

Sherwood Gagliano, Ph.D., an environmental scientist with an expertise in geography and geology, corroborating Dr. Good's testimony, agreed that Caernarvon's freshwater flow was contained between River Aux Chenes to the **21 west and Bayou Terre Aux Boeufs on the east. Noting the significance of the Trans-Gulf twin pipeline that ran north from the Mississippi River Gulf Outlet and south to the Mississippi River, he testified that most oyster productivity within the Caernarvon impact area and 5 ppt zone occurred on leases along the pipeline. Dr. Gagliano reiterated that stabilizing the salinity levels within the Breton Basin and preventing saltwater intrusion were the primary goals of freshwater diversion. He described the Caernarvon project as a "control structure" that "skimmed" fresh water and "light" sediment from the river. Because the structure was located above the base of the Mississippi River, it was impossible to divert large sediment deposits from the river's bottom through the structure and into the Breton Basin. Thus, the sediment diverted through the structure, alone, was insufficient to rebuild the State's coast. Although Dr. Gagliano acknowledged that the Caernarvon project "unavoidably" altered salinity conditions in the upper northwest end of the Breton

Basin, making the area less favorable to oyster cultivation, he emphasized that the Breton Sound estuary's changing ecosystem shifted the salinity zones eastward to the Gulf of Mexico, enhancing the development of brackish marshes in areas once too fresh to support oyster growth. The diversion, he explained, not only increased oyster productivity on public seed grounds, but eventually would restore 124,000 acres of marsh necessary for the creation of water bottoms suitable for oyster production. Thus, Dr. Gagliano opined that Louisiana's oyster industry would benefit greatly from the Caernarvon Freshwater Diversion Structure.

John W. Day, Jr., Ph.D., professor of oceanography and coastal studies at Louisiana State University, corroborated the testimony of Drs. Good and Gagliano. After conducting studies on the sediment ***721** deposits in the Breton Sound estuary as a ****22** result of the Caernarvon freshwater diversion, Dr. Day found approximately one-half inch of sediment per year deposited in "stations" located very near the Caernarvon structure. He found no significant increase in sediment in test stations in the lower end of the Breton Basin. He attributed the "slight" sediment deposits found in stations located near the Mississippi River to the river's discharge rather than to Caernarvon's flow. He, too, concluded that the sediment in the fresh water from Caernarvon was mineral and nutrient laden, which stimulated vegetation growth.

Gaines Geaghan, Ph.D., an expert in statistics and marine zoology, did a "post-construction analysis" of the Breton Basin using data collected by the DWF, the DNR, and the Corps from various "collection sites" located throughout the Breton Sound estuary. The DWF, he explained, monitored oyster growth using "nestier trays" located in sampling stations throughout the Breton Basin. The trays contained 20 individual compartments wherein oysters nested. The DWF biologists examined the trays monthly to determine the oysters' development and recorded their findings. Based on the recorded data, Dr. Geaghan demonstrated

through graphs that the oyster mortality rate in the Breton Basin was very low from year 1988 until May 1991 when it increased drastically as a result of the freshet. The oyster mortality rate declined in 1992 but rose again in February of 1993, where it remained until the end of the year. In January 1994, it increased to 70% and continued to rise. By the end of 1995, the oyster mortality rate had reached 95%. It remained high from 1995 through 1997, then steadily declined in years 1998, 1999, and 2000.

**23 Dr. Geaghan also analyzed weather and salinity patterns. He found that in the summer of 1991, following the freshet, oyster mortality appeared in the mid and lower regions of the Breton Basin. After Caernarvon went on-line, however, high oyster mortality appeared in the upper, northwest region of the Breton Basin near Lake Leary. In addition to the Caernarvon discharge, he attributed an increase in the oyster mortality rate to heavy rainfall and river discharges. He found salinity changes in the upper Breton Basin directly correlated to the Caernarvon diversion, whereas lower basin salinity changes correlated to river discharges. Also, he concluded that fresh water from the Bohemia structure, Bohemia Spillway, and Bayou LaMoque extended to upper areas of the basin, affecting salinity levels, vegetation, fisheries and wildlife, although to a lesser degree than the Caernarvon diversion.

At the DNR's request, Ronald Kilgen, Ph.D., an expert in oyster biology, and Maureen Mulino, Ph.D., an aquatic biologist with Steimle & Associates, Inc., an environmental studies firm, surveyed 21 oyster leases at issue in the present litigation on two separate occasions in late 1998 and early 1999. Dr. Kilgen testified that after poling the leases and ascertaining their substrates, he categorized his findings into three groups: (1) leases with no live oysters; (2) leases with spat (oysters less than a year old); and (3) leases with oysters 2, 3, and 4 years old. He determined that the leases with no live oysters were located in the upper region of the Breton Basin, west of the double pipeline.

He found leases that produced at least 50 sacks of "marketable" oysters per day in the lower region of the Breton Basin both west and east of the double pipeline. Also, he located leases that produced more than 50 sacks of oysters per day in the upper and lower regions of **24 the Breton Basin either near or west of the double pipeline. Notably, too, Dr. Kilgen discovered leases with significant oyster yields adjacent or in *722 close proximity to leases with no evidence of oysters. He attributed this finding to the fact that the respective lessees never managed the leases and/or many leases lacked reef necessary for oyster cultivation. According to Dr. Kilgen, the absence of reef, oyster shells, or oyster mortality on a lease indicated that the lease never did produce. He further testified that a study of leases in the area from the 1970's through 1990's revealed that even before the Caernarvon diversion in 1991 many oyster leases in the upper Breton Basin had never produced. Although Dr. Kilgen admitted on cross-examination that the Caernarvon's flow altered salinities, adversely affecting many leases in the upper Breton Basin, he emphasized that many leases had *no* prior history of production. Furthermore, Dr. Mulino testified that the lease surveys disclosed *no* areas of mass buried shells to indicate sediment had covered productive leases. In fact, she discovered *no* significant amount of sediment.

As to the eurasian water milfoil, Dr. Kilgen testified that it was plentiful along the entire Louisiana coast in 1994 and 1995, noting that it posed a significant problem to oyster leases in Lafourche and Terrebonne Parishes, which had never experienced a freshwater diversion. In his opinion, heavy rainfall proliferated the dense vegetation. Robert Anclet, a retired biologist who had been employed by the DWF for 28 years and managed fisheries in Coastal Area two, which included Breton Sound, agreed, testifying that, even prior to the Caernarvon diversion in 1991, he found eurasian water milfoil along the entire coast.

**25 To counter the plaintiffs' evidence regarding the value of their oyster leases, the State relied on the testimony of James Hanchey, assistant secretary of the DNR's Office of Coastal Restoration. Hanchey testified that the OLDEB was created pursuant to state statute to resolve conflicts between the oil and gas industry and the oyster industry that arose as the result of oil and gas exploration and production. Because the State has a tremendous interest in protecting the viability of both industries, he explained, it sought an equitable solution that resulted in fair treatment to the oil and gas industry while assuring the oyster fisherman actual compensation for damages to their oyster beds due to mineral activities. In other words, the State wanted to establish a uniform system of compensation for actual damages caused to the beds of oyster leaseholders.

Regarding the OLDEB's adoption of a uniform evaluation method, specifically, the cultch currency matrix, Hanchey testified that he had expressed serious reservations to Secretary Caldwell of the DNR at the board's meeting in January 1999 about adopting the matrix. Hanchey explained the DWF initially estimated that approximately 150 to 187 cubic yards of cultch per acre were needed to create reef on water bottoms, but later changed the estimate to 403 cubic yards per acre. *The drastic alteration, he testified, was not based on scientific data, but rather on the oil and gas industry's acquiescence to the oyster fishermen's wishes.* According to Hanchey, at the time, the oil and gas industry had several proposed projects whose commencement dates depended on the oyster lessees' authorizations to conduct surveys, exploration, and other activities on their leases. Failure to get proper authorization would jeopardize the projects and likely result in severe penalties and delay costs. Hanchey testified that the oil and gas **26 industry compromised, believing the evaluation process and its projects were "doomed" if it did not agree on the 403 cubic yards of cultch per acre figure for application in the matrix.

*723 In support of Hanchey's testimony, the DNR introduced into evidence the minutes from the OLDEB meeting on 5 January 1999. The minutes also reflect that Secretary Caldwell expressed his concern that certain values were higher than he thought they should be and "wanted to go on record that ... the evaluation guidelines are specifically intended to be used by the Oyster Lease Damage Evaluation Board in their processes and should not be construed as representing the State of Louisiana's view as to values that could be used in other kinds of circumstances." [FN15]

FN15. As other evidence in this case demonstrates, Secretary Caldwell was stating that the values were only relevant to evaluation of damages to oyster leases caused by oil and gas industry activity.

Hanchey testified that two factors comprised the oyster damage evaluation method used by the OLDEB, the cultch currency matrix and the standing oyster crop. The matrix, he explained, provided a method for compensating for substrate damage as the result of oil and gas activities, such as laying pipelines, while the standing oyster crop factor considered pre-project and post-project biological data to determine the value of an oyster crop loss on a particular lease. The pre-project and post-project biological data, including oyster lease surveys and assessments, were not available on all leases in the Caernarvon and Davis Pond impact areas, which Hanchey explained made the methodology impractical to use in diversion projects. In his opinion, the method for evaluating damages to an oyster lease as the result of oil and gas activity was not appropriate for determining damages to oyster leases as the result of freshwater diversion projects such as Caernarvon and **27 Davis Pond. He emphasized that an oyster bed incurred damage to its substrate as the result of oil and gas activity, yet did not incur damage to its substrate as the result of freshwater diversion. He also noted that the cultch currency matrix formula developed for use in the Davis Pond Relocation Program allowed for 150-187 cubic yards

of cultch *only on acres with existing cultch and active and productive oyster leases.* In other words, the Davis Pond Relocation Program formula did not allow compensation for areas of oyster leases that did not contain cultch material or hard bottom. Also, the formula provided no compensation for oyster leases located outside the project's target area.

Hanchey further testified that if the cultch currency matrix was to be used to value leases throughout the Breton Basin in this case, then the "Melancon Map" must be used in conjunction with it. The map, he explained, delineated oyster production zones based on salinity levels and discounted the cultch currency matrix accordingly. Less productive leases located outside the optimum salinity zone were discounted substantially. For example, the value of oyster leases located in the fresher, northern region and saltier, southern regions of the Breton Basin was discounted from 403 cubic yards of cultch per acre to 10% of that or 40 cubic yards per acre. Hanchey demonstrated that the Davis Pond Relocation Project did not use the Melancon Map to discount oyster leases because the relocation involved only active and productive leases located north of the 5 ppt line. Nevertheless, he reiterated that the OLDEB had to consider salinity regimes and apply the map to the cultch currency matrix in determining lease damages as a result of oil and gas activity because such activity occurred throughout the entire basin.

**28 Walter R. Keithly, Jr., Ph.D., a resource economist and LSU assistant professor appointed to both the Coastal *724 Fisheries Institute and Institute for Environmental Studies, testified for the State as an expert in evaluating the seafood industry. The cost of and amount of cultch on a lease, he explained, was not the only factors to be considered in determining the value of a lease. Dr. Keithly emphasized that the

costs associated with oyster production and the revenues generated therefrom must also be considered. The "market value" of an oyster lease, he explained, was the price a willing buyer would pay to a willing seller for the lease, and long-term, the value would not exceed the income derived from the lease.

Dr. Keithly noted that from the mid 1980's to early 1990, many of the leases at issue in the instant litigation were non-productive because they fell within the seasonal closure line. Although, in some instances, the DHH allowed the oyster fishermen to "relay" their oysters to productive leases, the cost of doing so exceeded any benefit because oyster prices were low at the time. Dr. Keithly also noted that even though many of the leases were unproductive and/or the DHH had deemed them unsuitable for production purposes for extended periods, the leaseholders yearly chose to renew and retain the leases because they derived substantial revenues from oil and gas interests, who continued to conduct surveys, seismic activities, oil exploration, lay pipelines, et cetera, on the leases.

Contrary to the plaintiffs' claims, Dr. Keithly testified that the cost to restore a lease did not equal its value, explaining that the costs of laying cultch and building reef, in some cases, might exceed the revenues generated from the lease. He also noted that, in terms of oyster production, a lease's value was the income ****29** generated from it. "As a rule of thumb," Dr. Keithly explained, if the value of a lease is less than its restoration cost, a prospective buyer would pay the value. To calculate the average value of oyster leases in Plaquemines Parish for the period 1988 through 1997, Dr. Keithly reviewed data from the DWF detailing the number of leased acres, the amount of oysters harvested yearly from the leases, the price of oysters, and bills of sale on lease transfers. In addition, he reviewed tax and business records from several oyster fishermen. Along with the data, Dr. Keithly considered the 1993 Anderson Study, [FN16] which concluded the average value of an oyster lease ranged from $160.00 to $170.00 per acre. Based on his research, Dr. Keithly

determined that the average value of a lease in Plaquemines Parish prior to Caernarvon going on-line was $200.00 per acre. As to the class representative's leases, Dr. Keithly estimated the average value of Skansi's leases to be $558.00 per acre prior to Caernarvon going on-line and $343.00 per acre afterwards. He attributed the sharp decline to a reduction in the price of oysters and low productivity. Dr. Keithly testified that the average value of Avenal's leases was $195.00 per acre prior to Caernarvon going on-line but much lower following the freshwater diversion because Avenal had purchased many of the leases at public auction after 1991 when other leaseholders chose not to renew the leases due to low productivity. In fact, Avenal admitted that he purchased two of his **725 leases on the same day this suit was filed. Duplessis had provided Dr. Keithly with production records for only six months of the year 1990, evidencing the lessee **30 harvested 1.4 sacks of oysters per acre on a 155-acre lease. The records also showed that Duplessis began subleasing acreage from Fox in 1991. Dr. Keithly testified that Duplessis' leases were neither productive nor valuable, noting that Duplessis would not have subleased from Fox if his own leases had been productive. As to Fox, Dr. Keithly testified that he had leases located throughout the basin, many of which were sublet to other oyster fishermen. Fox's records, however, contained scarce harvesting information. Nonetheless, based on the other available data, Dr. Keithly estimated the average value of Fox's leases at $200.00 per acre.

FN16. In 1992, the U.S. Food and Drug Administration considered imposing a moratorium on oyster harvesting from Louisiana water bottoms after the DHH reported finding the potentially fatal *vibrio vulnificus* bacteria among oyster crops. Prior to taking action, the FDA retained an environmental firm from North Carolina to study and analyze the potential impact of such a closure.

In connection with this study, the firm determined the average market value of an oyster lease at the time using two methods: (1) discounting profits over time; and, (2) asking oyster leaseholders the value of their leases.

Over the plaintiffs' objection, the trial court allowed the DNR to introduce into evidence seafood dealer records from plaintiff, Rodney Fox, an owner of R & A Oyster Company, Inc., and son of Kenny Fox. [FN17] The records disclosed that from 1997 to 2000, Lease 31453 produced 16,612 sacks of oysters. Rodney Fox acknowledged that his gross sales for 1999 totaled $3.8 million. In addition, he admitted that many leases that were deemed unsuitable for production as the result of the freshwater diversion in 1991 *were now producing*. The DNR also elicited testimony from the named individual plaintiffs on cross-examination that they continued to collect thousands of dollars for damages to their leases in the Breton Basin from oil and gas interests as the result of oil and gas exploration activities.

FN17. DNR requested that subpoenas be issued to the seafood dealers throughout Plaquemines and St. Bernard Parishes, who kept records of actual oyster production from oyster leases located within the Breton Basin. It argued that the subpoenas were necessary because the plaintiffs failed to produce their own production records during discovery. The plaintiffs filed a motion to quash the subpoenas, which the trial court granted on 5 November 1998. This Court upheld the trial court's ruling in *Avenal v. State, unpub.*, 99-0319 (La.App. 4 Cir. 12/15/00). Nevertheless, shortly before trial, the trial court ordered Rodney Fox to produce his business records.

After the eight-day trial on the merits, the jury returned a verdict in favor of the five class representatives, responding "yes" to the jury interrogatory, "Do you **31 find that the State has taken actions which have *taken or damaged* the [plaintiffs']

right to property?" [Emphasis added.] It found Avenal, Duplessis, Fox, Fox Oyster Company, and Skansi sustained damages on 826, 255, 948, 759 and 261 acres of their leased water bottoms, respectively. The jury determined that an amount of $21,345.00 per damaged acre would adequately compensate plaintiffs Duplessis, Skansi, Fox, and Fox Oyster Company for their losses, while $1,000.00 per damaged acre would compensate Avenal.

Prior to the trial court rendering its judgment, on 2 January 2001, the DNR filed motions for judgment notwithstanding the verdict ("JNOV"), new trial, or alternatively, remittitur. Several days later, the trial court, in accordance with the jury's verdict, rendered judgment awarding Avenal $826,000.00; Duplessis $5,442,975.00; Fox $20,235,060.00; Fox Oyster Company $16,200,885.00; and Skansi $5,571,045.00. The awards combined totaled $48,275,935.00. Likewise, the court awarded the remaining class members similarly situated to Avenal and those similarly situated to the four other class representatives their respective damages. In addition to compensatory damages, the judge awarded the plaintiffs attorney's **726 fees pursuant to La. R.S. 13:5111 and court costs.

On 12 January 2001, the DNR again filed motions for JNOV, new trial, or alternatively, remittitur. The trial court denied all post-trial motions filed in the trial court. On 16 March 2001, the DNR filed an application for supervisory writs seeking review of the trial court's denial of its motion for new trial and its refusal to abide by this Court's 15 December 2000 ruling that the trial court either grant or deny the motion for partial summary judgment on the indemnity issue at least ten days prior to trial. This court declined to exercise its supervisory jurisdiction, **32 ruling that the DNR's writ application should be consolidated with its pending appeal. [FN18]

FN18. *Avenal v. State, unpub.*, 01-0542 (La.App. 4 Cir. 5/22/01).

Assignments of Error

On appeal, the DNR raises the following fourteen (14) assignments of errors:

(1) The jury erred in awarding the plaintiffs damages for the restoration of state-owned water bottoms.

(2) The trial court erred as a matter of law by allowing the plaintiffs to recover from the State the costs for restoring the State's own water bottoms.

(3) The trial court erred in allowing the plaintiffs to recover damages based upon the cultch currency matrix rather than recognized elements of damages.

(4) The trial court erred in awarding damages in excess of the fair market value of the plaintiffs' leases.

(5) The jury erred in finding that the Caernarvon freshwater diversion flow was the proximate cause of the plaintiffs' damages.

(6) The trial court erred in giving a jury interrogatory that improperly eliminated the plaintiffs' burden of proving a permanent taking.

(7) The jury verdict and trial court judgment are contrary to the law and evidence presented at trial.

(8) The trial court erred in refusing to decertify or redefine the class.

(9) The trial court erred in extrapolating the jury's verdict class-wide as it eliminated the plaintiffs' burden of proving causation for the remainder of the class.

(10) The trial court erred in excluding the State's side scan sonar evidence.

(11) The trial court erred in not finding that the plaintiffs' claims have prescribed pursuant to La. R.S. 9:5624.

****33** 12) The trial court erred in forcing the State to exhaust its peremptory challenges by allowing biased persons to remain on the jury.

(13) The trial court erred in awarding damages for oyster leases in which the plaintiffs' held no compensable interest.

(14) The trial court erred in refusing to determine prior to trial

the validity of the indemnification clauses contained in the plaintiffs' oyster leases. [FN19]

FN19. The plaintiffs argued to the trial court that the hold harmless and indemnity clauses were unilaterally inserted by the DWF into their oyster lease agreements and are invalid in light of the decision in *Jurisich v. Jenkins*, 99-0076 (La.10/19/99), 749 So.2d 597. In *Jurisich*, the Louisiana Supreme Court addressed the scope of authority granted to the secretary for the DWF with respect to the renewal of oyster leases as provided by La. R.S. 56:428. At issue was whether the secretary could refuse to renew oyster leases unless the oyster lessees agreed to the inclusion of an onerous condition, which was not part of their original lease agreements. Specifically, the lease renewals were contingent upon the inclusion of a clause which made the oyster leases "subservient to navigation, maintenance of navigation, and all normal, usual and permissible mineral and oil field activity which had been sanctioned by the State through a prior existing lease, permit, or contract." The Court held that the discretion of the secretary to renew an oyster lease is limited by a determination of the lease's capability of supporting oyster populations as provided in La. R.S. 56:428 A, and to allow the navigation and oil field activity clause as a condition of lease renewal would have been an impermissible expansion of the secretary's authority. *Id.* at p. 7, 749 So.2d at 601. The Court noted that the legislature specifically provided the law the secretary must apply in oyster lease renewals, and for expansion of this authority, the secretary must seek legislative authority to do so. *Id.* Interestingly, the Supreme Court limited its review to consideration of the Navigation and Oil Field Activity clause, although the *Jurisich* plaintiffs, like the plaintiffs in the case at bar, also complained of the Coastal Wetlands Restoration Advisory clause and the Allocation of Risk and Liability,

and Indemnification clause. Notably, too, the *Jurisich* decision applied only to the renewal of existing oyster leases and not to newly acquired ones.

In response to the Supreme Court's decision in *Jurisich,* the legislature, by Acts 2000, 1st Ex.Sess., No. 107, § 1, enacted La. R.S. 56:427.1, which provides:

A. Notwithstanding any other law to the contrary, the state of Louisiana, its political subdivisions, and its agents or employees shall be held free and harmless from any claims for loss or damages to rights arising under any oyster lease, renewal, or extension granted to any individual or other entity for any purpose from diversions of fresh water or sediment, depositing of dredged or other materials, or any other actions taken for the purpose of management, preservation, enhancement, creation, or restoration of coastal wetlands and from impacts associated with projects authorized and defined under the state's Coastal Wetlands Conservation and Restoration Plan.

B. All departments, agencies, boards, or commissions of the state of Louisiana and its political subdivisions shall include language which shall hold the state and its political subdivisions harmless for the purposes set out in this Section in all oyster leases, renewals, or extensions granted to any individual or other entity after July 1, 1995.

Section 2 of Acts 2000, 1st Ex.Sess., No. 107 provided: This Act is intended to be remedial in nature and delineates legislative intent and shall be retroactive as it applies to any oyster leases, renewals, or extensions granted to any individual or other entity on state water bottoms whose rights may be affected by coastal restoration projects.

Thus, to the extent that the above hold harmless clause was included in any oyster lease, renewal, or extension granted to a plaintiff after July 1, 1995, it may affect the respective plaintiff's claim. Nevertheless, in view of the

discussion herein, I would decline to address the merits of this issue at this time for I would decide this case on other grounds.

***727 **34** Plaintiff Avenal, the only individual class representative to appeal, argues that the jury erred in awarding him only $1,000.00 per damaged acre while awarding the other class representatives $21,345.00.

Because I would resolve the merits of this case in its entirety on only some of these assignments, I would pretermit a discussion of the remainder.

Discussion of the Law and Facts.

La. R.S. 41:1225 authorizes the DWF to grant leases on state-owned water bottoms for oyster cultivation, bedding, and harvesting, and matters relating thereto, as provided in Subpart D of Part VII of Chapter 1 of Title 56 of the Louisiana Revised Statutes of 1950, i.e., La. R.S. 56:421 *et seq.* Accordingly, La. R.S. 56:425 provides that the secretary of the DWF may only lease state-owned water bottoms and natural reefs on the water bottoms of the State to a resident, a firm composed of residents, or a corporation domiciled in or organized under the laws of Louisiana. The secretary's right to grant oyster leases is likewise contingent upon a determination that the State owns the water bottoms to be leased, and that the lessee agrees that he will operate under Louisiana laws and pursuant to the DWF's rules and regulations. La. R.S. 56:425 A and B. All leases made under the provisions of Subpart D begin on the date the lease is ***728** signed and continue for a period of fifteen years. La. R.S. 56:428 A. The owners of expiring ****35** oyster leases have the first right of renewal of their oyster leases provided the lease is capable of supporting oyster populations. *Id.*

Regarding the property rights of an oyster lessee, La. R.S. 56:423 provides, in pertinent part:

A. A lessee shall enjoy the exclusive use of the water bottoms leased and of all oysters and cultch grown or placed thereon, subject to the restrictions and regulations of this subpart.
B. (1) A lessee of oyster beds or grounds who has obtained, recorded and marked his lease in compliance with the law shall have the right to maintain an action for damages against any person, partnership, corporation or other entity causing wrongful or negligent injury or damage an action for damages to the beds or grounds under lease to such lessee.

* * *

(3) Any action for damages under this Section shall be brought within one year of the occurrence of the wrongful or negligent act, or within one year of the date of discovery of such act, whichever last occurs.

Louisiana courts have recognized that the statutory laws relative to the leasing of water bottoms for oyster production differ from the provisions that govern ordinary conventional leases addressed in Title IX of Book III of the Civil Code, La. C.C. arts. 2668 *et seq.* *Jurisich v. Jenkins*, 99-0076 (La.10/19/99), 749 So.2d 597, citing *Vujnovich v. Louisiana Wildlife & Fisheries Comm'n*, 376 So.2d 330 (La.App. 4 Cir.1979); *see also* *Inabnet v. Exxon Corp.*, 93-0681 (La.9/6/94), 642 So.2d 1243 (Kimball, J., dissenting in part). The major difference concerns: "oyster lease renewal is statutorily provided and is not contingent upon a contractual provision for its existence." *Jurisich* at p. 6 n. 4, 749 So.2d 600 n. 4.

****36 *The* Inabnet *Decision***

The Louisiana Supreme Court in *Inabnet, supra,* considered whether an oyster lessee had a right to recover, as damages, the cost of restoring oyster beds damaged by the defendant company's dredging operations. The plaintiff, an oyster lessee, sought to recover damages to his oyster lease caused by dredging operations conducted by an independent contractor for Exxon

Corporation, who held a surface lease and canal right-of-way that predated and overlapped the plaintiff's oyster lease. The court addressed the correlative rights and obligations of the two parties, both as holders of coexisting rights to the same property and as holders of rights on neighboring properties. The Court concluded that the parties held coexisting rights only on the property covered by Exxon's right-of-way and surface lease, an area of 8.2 acres. As to these 8.2 acres, the Court determined that the liability of one for damage to the other depends on proof of more than just causation and damages. 93-0681 at pp. 14-15, 642 So.2d at 1252-53.

The record disclosed that in 1972 Exxon acquired the right from the State to dredge, maintain and use the canal on the right-of-way and to install and operate a tank battery on the surface lease. When the plaintiff acquired his oyster lease ten years later, the canal had been dredged and was being used, and the tank battery had been constructed and was operating. The nature of Exxon's existing use incidental to its surface lease and right-of-way precluded oyster production on the same property and made the 8.2 acres unavailable for the plaintiff's use under his lease. Moreover, Exxon's maintenance dredging in 1983 did nothing to cause further damage ***729** to the plaintiff's right to use the 8.2 acres for growing oysters, because that right was already nil. The State, if it had not granted the plaintiff's ****37** oyster lease, would have had no right to use the 8.2 acres in a manner inconsistent with Exxon's use, and the plaintiff did not acquire under the oyster lease any rights greater than those of the landowner. Thus, the Court concluded that Exxon was not liable for any damages to the plaintiff in their relationship as holders of co-existing right to the 8.2 acres. *Id.* at pp. 15-16, 642 So.2d at 1253.

As to Exxon's liability in its relationship with the plaintiff as neighboring proprietors, the Court noted that pursuant to La. C.C. arts. 667-669, Exxon was prohibited from performing any actions on its surface lease and right-of-way that would cause

damage to the plaintiff on the adjoining property or interfere substantially with the plaintiff's enjoyment of the property, and the plaintiff was required to tolerate some inconvenience from Exxon's normal use of its property rights. The Court determined that the 1983 dredging caused damage to property that was within the plaintiff's oyster lease but outside of Exxon's surface lease and servitude. The damaged property consisted of 4.28 acres dredged by Exxon to the west of the right-of-way, the 5.13 acres east of the right-of-way on which Exxon deposited dredged materials and created a spoil bank, and the 13.84 acres of slumped spoil spread area and prop wash area. The Court found that Exxon was liable for the damages sustained by the plaintiff because of the dredging on the 4.2 acres west of and outside the right-of-way. *Id.* at pp. 16-17, 642 So.2d at 1253-54. As to the spoil bank area and slumped spoil spread area, the Court noted that Exxon's 1972 right-of-way agreement gave Exxon the right to deposit soil on banks, but was silent as to any right to spread dredged materials or to establish a spoil bank outside the servitude. Because Exxon did not obtain any express authority from the State to establish a spoil bank or to spread the spoil in the bay, ****38** the Court concluded that Exxon's use of the property in its servitude area in such a manner as to injure its adjoining neighbor constituted fault under La. C.C. art. 2315, by analogy to La. C.C. arts. 667-669, and that Exxon's use occasioned more than mere inconvenience to the neighbor. Thus, the Court concluded that Exxon was liable without negligence for the damages sustained by the plaintiff because of the manner of disposition of the dredged materials and the slumping of the spoil from the bank. *Id.* at pp. 18-19, 642 So.2d at 1255.

Significant to the current case, the Court, addressing the issue of damages, found that the trial court erred in awarding the plaintiff oyster lessee the cost of restoring the water bottoms to their original condition by removing the spoil bank and by reconstructing the marsh mat with a 6-inch mat of shells over the entire damaged area of more than twenty-six acres. The Court stated:

La.Rev.Stat. 56:423 B(1) recognizes an oyster lessee's right to recover his own damages for injury to his oyster beds. The awards for loss of seed oysters and loss of income from anticipated production were based on this right of recovery. However, the statute cannot reasonably be construed to authorize recovery of damages sustained by another party. The critical question, therefore, is whether plaintiff has a real and actual interest in recovering restoration costs in this particular case. (Footnote omitted).

Id. at pp. 19-20, 642 So.2d at 1255. In footnote 15 of the opinion, the Court expressed its concern with allowing a non-***730** owner to recover the costs of restoring state-owned water bottoms, noting:

> The owner of water bottoms is normally the party with the right of action to recover the costs of restoration. In some situations, as in a long-term lease in which the lessee has made significant improvements, the lessee may have a greater interest than the owner in restoring damaged property. The present case, however, does not present such a situation. Moreover, if the oyster lessee were allowed to recover damages for injury to the water bottoms, the lessee would not be obliged to restore the ****39** water bottoms and could use the money as he pleases, leaving the owner (the State) without even the opportunity to accomplish the restoration.

Id. at p. 20 n. 15, 642 So.2d at 1255-56 n. 15. Nonetheless, the Court emphasized that:

> This is not to say that Exxon's dredging did not cause plaintiff damages to his leasehold interest, in addition to the loss of seed oysters and loss of anticipated income from production from those oysters. The value of plaintiff's leasehold interest may have been reduced by destruction of or damage to the water bottoms, and plaintiff has a real and actual interest in that recovery. However, that item of damages is measured in this case by the value of the leasehold interest before and after the

dredging, and not by the cost of totally rebuilding the water bottoms to their former condition.
Id. at p. 21, 642 So.2d at 1256.

The record before us discloses that other than their own self-serving testimony regarding the damages to their oyster crops and leases resulting from the freshwater diversion, the plaintiffs put forth *no* evidence generally submitted in expropriation, inverse condemnation, or oyster lease damage cases. The record contains no evidence of the money, time, and effort expended by the plaintiffs in developing their leases. The plaintiffs failed to produce any evidence of the fair market value of their oyster leases before and after the freshwater diversion. Nor did they put forth documentary evidence such as state and federal income tax returns or oyster production records to reflect their sales, income, profits, and losses for the years before and after the freshwater diversion. Rather, the plaintiffs chose to rely solely on the application of the cultch currency matrix formula to prove their damages in this case. To the extent the jury utilized the cultch currency matrix to determine the value of the plaintiffs' oyster leases based on the cost of restoring the state-owned water bottoms and quantified the damages accordingly, **40 the jury's verdict is clearly contrary to the Supreme Court's holding in *Inabnet* that only the State, the owner of the water bottoms, may recover as damages the costs of restoring and rebuilding the water bottoms to their pre-damaged condition. Nonetheless, the plaintiffs argue that *Inabnet,* which involved a tort action, is inapposite to the present action in inverse condemnation.

Law of the Case Doctrine

Thus, the threshold issue to be addressed in this appeal is whether the law of the case doctrine [FN20] applies such that our *731 earlier decisions in *Avenal v. State, Dept. of Nat. Resources,* 95-0836, 95-2421 (La.App. 4 Cir. 11/30/95), 668 So.2d 1150, and *Avenal v. State, supra,* preclude us from

considering whether the plaintiffs' action is one in tort rather than in inverse condemnation. The plaintiffs contend that the aforementioned decisions establish that the instant suit is an inverse condemnation for the appropriation or taking of their property and governed by La. R.S. 13:5111. I do not, however, find this to be the case.

> FN20. The law of the case principle recognizes (a) the binding force of trial court rulings during later stages of the trial, (b) the conclusive effects of appellate rulings at the trial on remand, and (c) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal in the same case. Reasons assigned for the application of the policy are: the avoidance of indefinite re-litigation of the same issue; the desirability of consistency of the result in the same litigation; and the efficiency and essential fairness to both sides, of affording a single opportunity for the argument and decision of the matter at issue. *Petition of Sewerage and Water Bd. of New Orleans*, 278 So.2d 81 (La.1973).

In support of a finding that a taking concurred in this case, the majority states:

> In fact, two prior published decisions of this court have held that this is a takings case. *See Avenal v. State*, 99-0127 (La.App. 4 Cir. 03/15/00), 757 So.2d 1; *Avenal v. State, DNR*, 95-0836 (La.App. 4 Cir. 11/30/95), 668 So.2d 1150.
> 2001-0843 at p. 12, at 705.

**41 I find that the majority misreads our holdings in those two earlier cases.

In *Avenal v. State, Dept. of Nat. Resources, supra,* this court considered the trial court's denial of the State's exception of improper venue and dilatory exception of nonjoinder of a necessary party. While we noted that, "a simple review of

plaintiffs' petition is one of inverse condemnation," we concluded that "after a trial on the merits, the courts will have to determine if there was in fact a taking of property rights within the purview of Article I, [§] 4" as "*that issue is not before us at the present time.*" [Emphasis supplied.] Moreover, in *Avenal v. State, supra,* which *was before us on supervisory writs to review the trial court's denial of a motion for summary judgment,* a majority of the court determined that "[b]ecause the defendants have not paid any compensation to the plaintiffs, this case *may* amount to inverse condemnation." [Emphasis added.] In neither of the aforementioned cases did we specifically state or hold that the plaintiffs' claims constituted a taking within the meaning of Article I, § 4 of the Louisiana Constitution. Thus, this court is not bound by a prior holding that the plaintiffs' claims amount to an inverse condemnation and a taking within the purview of Article I, § 4. By upholding the denial of the trial court's denial of a motion for summary judgment, we only held that a genuine issue of material fact existed that precluded the granting of the summary judgment.

Louisiana Code of Civil Procedure establishes a system of fact pleading. *See* La. C.C.P. art. 854. If facts constituting a claim are alleged, the party may be granted relief to which he is entitled under the pleadings and the evidence; the "theory of the case" doctrine, under which a party must select the theory of his case and adhere to it throughout the litigation, has been abolished. *See* **42La. C.C.P. art. 862; *First South Production Credit Assoc. v. Georgia-Pacific,* 585 So.2d 545 (La.1991).

As previously mentioned, the plaintiffs herein allege in their petition that they currently own or have owned oyster leases that have been damaged as a result the DNR's diverting freshwater from the Mississippi River through the Caernarvon Freshwater Diversion Structure into the areas of their leases. They further allege that the fresh water diluted the water salinity levels adversely affecting their oyster leases by killing oysters and rendering the beds unsuitable for further cultivation. A fair

reading of the plaintiffs' petition is that they are seeking damages *732 for the destruction of their leases. That claim is not limited by the specific reference in the petition to seeking compensation for the destruction of their leases "which were appropriated for public use by the State through the actions of the [DNR]" and "taken pursuant to Article I, § 4." The plaintiffs' demand does not foreclose their right to recover other damages to which they may be entitled under the facts asserted, i.e., tort damages. At the same time, it does not preclude a determination by this Court that plaintiffs' claims are delictual only. That being said, I now consider whether plaintiffs' claims constitute a "taking" or an appropriation (inverse condemnation).

***Article I, § 4 of the Louisiana Constitution* and Its Interpretation**

Authorization for bringing an action for compensation following a taking by a public entity is grounded in Article I, § 4 of the 1974 Louisiana Constitution, which provides:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> **43 *Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.* Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction.

Personal effects shall never be taken. But the following property may be forfeited and disposed of in a civil proceeding, as provided by law: contraband drugs; property derived in whole or in part from contraband drugs; property used in the distribution, transfer, sale, felony possession, manufacture, or transportation of contraband drugs; property furnished or intended to be furnished in exchange for contraband drugs; property used or intended to be used to facilitate any or the above conduct; or other property because the above described property had been rendered unavailable.

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

[Emphasis added.]

The term "property" encompasses both tangible and intangible property rights, including a lessee's leasehold interest, even if unrecorded. *State Dept. of Transportation and Development v. Jacob*, 483 So.2d 592 (La.1986).

Recognizing a property owner's right to compensation pursuant to Article I, § 4 when a public entity has taken or damaged his property without proper expropriation proceedings, the Louisiana Supreme Court in *Constance v. State Through Dept. of Transp. & Development Office of Highways*, 626 So.2d 1151, 1156 (La.1993) stated:

**44 La. Const. art. I, § 4 and its predecessor article, La. Const. of 1921 art. I, § 2, have been interpreted to support a proceeding by a property owner for a *733 taking or damaging even in the absence of an expropriation action. Despite the legislative failure to provide a procedure to seek redress when property is damaged or taken without proper exercise of eminent domain, this Court has held that a cause of action must arise out of the self-executing nature of the constitutional command to pay just compensation. *Chambers*, 595 So.2d at 602; *Reymond v. State, Through the Department of Highways*, 255 La. 425, 231 So.2d 375, 383 (1970). Such a cause of

action is referred to as an inverse condemnation, which is defined in *Reymond* as the "proceeding whereby an owner may seek redress when his property is damaged or taken without the proper exercise of eminent domain."
Id. [Footnotes omitted.]

In *State Through Dept. of Transp. & Development v. Chambers Investment Co.*, 595 So.2d 598 (La.1992), the Supreme Court, acknowledging that the taking and damaging of legal property rights is by nature abstract and conceptual and often incompletely understood, adopted a three-prong analysis to determine whether a claimant is entitled to eminent domain compensation. The Court stated:

> Under this analysis, we must first determine if a person's legal right with respect to a thing or an object has been affected. In other words, we must be able to identify a recognized species of private property right that has been affected, regardless of whether causes of action may exist on other theories; otherwise, it cannot be said there has been an exercise of the power of eminent domain. Second, if it is determined that *property* is involved, we must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power. The final question then is whether the taking or damaging is for a public purpose.
> 595 So.2d at 603. [Emphasis in original.]

The plaintiffs argue that the DNR's actions in this case constitute a taking or an appropriation pursuant to La. R.S. 13:5111, because this appropriation statute mandates an award of attorney's fees and, crucial to the plaintiffs' claims, **45 establishes a three year prescriptive period for filing suit for compensation for a taking of property. La. R.S. 13:5111 provides:

§ 5111. Appropriation of property by state, parish, municipality or agencies thereof; attorney, engineering and appraisal fees; prescription

A. A court of Louisiana rendering a judgment for the plaintiff, in a proceeding brought against the state of Louisiana, a parish, or municipality or other political subdivision or an agency of any of them, for compensation for the taking of property by the defendant, other than through an expropriation proceeding, shall determine and award to the plaintiff, as a part of the costs of court, such sum as will, in the opinion of the court, compensate for reasonable attorney fees actually incurred because of such proceeding. Any settlement of such claim, not reduced to judgment, shall include such reasonable attorney, engineering, and appraisal fees as are actually incurred because of such proceeding. Actions for compensation for property taken by the state, a parish, municipality, or other political subdivision or any one of their respective agencies shall prescribe three years from the date of such taking.

B. The rights of the landowner herein fixed are in addition to any other rights he may have under the constitution of ***734** Louisiana and existing statutes, and nothing in this part shall impair any constitutional or statutory rights belonging to any person on September 12, 1975.

The term "appropriation," which is the crux of this matter, is not defined in the above statute, nor does it appear in the definitions section of the act. *See* La. R.S. 13:5102. Unlike La. R.S. 38:301, the appropriation statute that provides for compensation to property owners whose property is "taken, used, damaged, or destroyed" for levee or levee drainage purposes pursuant to Article VI, § 42 of the 1974 Louisiana Constitution, La. R.S. 13:5111, by its very terms, applies only to claims for compensation for the *taking* of property.

The disjunctive language of Article I, § 4 that "[p]roperty shall not be *taken or damaged* by the state ..." implies that the terms "taken" and "damaged" have separate, distinct meanings.

[Emphasis added.] Property is considered as "taken" **46 when the public authority *acquires* the right of ownership or one of its recognized dismemberments. *Columbia Gulf Transmission Company v. Hoyt*, 252 La. 921, 215 So.2d 114 (1968), noted at 43 Tul. L.R. 714 (1969); *Soma Enterprises v. State, through D.O.T.D.*, 521 So.2d 829, 831 (La.App. 2 Cir.1988); *State, DOTD v. Sugarland Ventures, Inc.*, 476 So.2d 970, 974 (La.App. 1 Cir.1985). Property is considered "damaged" when the *action* of the State results in the diminution of value of the property. *See Hoyt, supra*, 215 So.2d at 120; *Soma Enterprises, supra.*

The Louisiana Supreme Court, in *Constance, supra*, 626 So.2d at 1156, discussed the liability of a public body in an inverse condemnation action, stating:

> The liability of a public body in such case, however, had been limited to "those instances where there is a physical taking or damage to property or a special damage peculiar to the particular property and not general damage sustained by other property similarly located." *Reymond*, 231 So.2d at 383. In assessing that special damage, it must be determined "whether that damage is not suffered by those in the general neighborhood--that is, whether the damage is peculiar to the individual who complains." *Id.* at 384.

The Court also acknowledged the trend in opinions toward the increasing acceptance of the possibility of takings without physical invasion, noting, "*any* substantial interference with the free use and enjoyment of property may constitute a taking of property within the meaning of the federal and state constitutions." *Chambers Investment Co., supra*, 595 So.2d at 602. [Emphasis in original.]

An explanation of the terms "eminent domain," "expropriation," and "appropriation" as used in the context of Louisiana's civilian jurisprudence is set forth in Michael G. Dakin & Michael R. Klein, *Eminent Domain in Louisiana* 2-3 (1970 and Supp.1978), which states:

There are intended lines of differentiation amongst these terms, although it is clear that the lines have not always been respected or understood by Louisiana courts or commentators. All three, to be sure, describe aspects **47 of the power which government has to compel the transfer of existing use or ownership of property. The most inclusive phrase, eminent domain, is a general heading identifying this authority. In common-law jurisdictions, the exercise of this authority is referred to as condemnation. This is not the case in Louisiana. Instead, the great bulk of that which is included in a description of the exercise of the power to compel the transfer of property is properly described *735 as "expropriation." Most of the otherwise unincluded aspects of this exercise of eminent domain authority are subsumed under the Louisiana term "appropriation." As distinguished from the apparent dual meaning of "appropriation," "expropriation" is properly descriptive only of the authorized use of judicial coercion to compel the transfer of existing property rights conditioned upon the prior payment of just compensation. Conversely, one meaning of the term "appropriation" is the *unauthorized* use of the force of government or its agents to deprive a current landowner of his property without conformity to the requirements of the Louisiana constitution or the relevant jurisprudence. But, in addition to this epithetical significance, "appropriation" is also properly descriptive of the authorized exercise of property rights vested in the public by virtue of the jurisprudence, an exercise not intrinsically conditioned upon the payment of compensation.

To determine whether the DNR's actions in this case constitute an "appropriation" or "taking" of the plaintiffs' oyster leases as contemplated by La. R.S. 13:5111, one must look to the jurisprudence interpreting a "taking" of property pursuant to Article I, § 4 and La. R.S. 13:5111.

In *Chambers Investment Co., supra,* the State, in connection with the construction of Interstate 49 between Alexandria and

Lafayette, expropriated 41.951 acres of land from the middle of a 300-acre tract in Rapides Parish and deposited in the registry of the district court the sum representing the State's estimated compensation to the landowner for the land taken and severance damages to the remainder. Prior to the expropriation, the 300-acre tract had been used as farmland. Sometime after the expropriation, the landowner explored the possibility of developing the remaining land as a residential subdivision, but **48 abandoned the idea after learning the land might lie in the proposed path of Interstate 49. The landowner filed suit for compensation for the land taken and severance damages. The trial court awarded the landowner damages for the past and anticipated delay in developing its land as a result of highway construction on the State's adjacent property, which the appellate court affirmed. [FN21] The Supreme Court granted writs [FN22] and held that the landowner had a recognized and constitutionally protected property right to use and enjoy its land by developing it as a residential subdivision, subject to La. C.C. arts. 667 and 668, which imposed limitations on a landowner's right of ownership, including tolerating some inconvenience from the lawful use of a neighbor's land. The Court found that the construction use of the State's adjacent tract did not exceed the inconvenience that the landowner was bound to tolerate. Thus, the Court concluded that any delay the landowner experienced in developing its property did not constitute a taking because its constitutionally protected property right was not taken. 595 So.2d at 606.

FN21. 576 So.2d 1174 (La.App. 3 Cir.1991).

FN22. 584 So.2d 1144 (La.1991).

The following year, in *Constance, supra,* the Supreme Court considered whether the landowners' restricted access to their property with accompanying reduction in property value and temporary loss of business income was a compensable taking of property. The plaintiffs in *Constance* owned a building wherein

they operated Cleary Bicycle, Moped & Go-Cart Center, Inc., located on the Interstate 10 Service *736 Road adjacent to the Interstate 10/Clearview Parkway interchange in Metairie. In connection with the construction of a new westbound I-10 exit ramp at Clearview Parkway, the Louisiana Department of Transportation and Development ("DOTD") re-routed the four primary approaches to the intersection of Clearview Parkway and the I-10 Service Road. After completion of **49 the project, two of the four approaches were permanently altered, requiring a more circuitous route to the plaintiffs' bicycle shop and other businesses nearby. The Supreme Court determined that although the landowners' street access was a private property right that had been affected for a public purpose, the landowners presented no evidence of physical damage to the property or excessive or abusive conduct by the DOTD. The Court noted that the barricades, the signs, and the parked equipment, which impeded or interfered with access to plaintiffs' property for a brief period, were precisely the types of disturbances, inconvenience, or even financial loss ordinarily occasioned as a general consequence of such a public improvement. The Court further noted that although the DOTD could have better accommodated the adjacent property owners during construction, its actions never rose to the level of excessive or abusive conduct that neighboring landowners need not tolerate. The Court also found no special damage peculiar to the private landowners' particular property existed as the damage was suffered by those in the general vicinity. Thus, the Court held no compensable taking had occurred. 626 So.2d at 1158.

In *Rivet v. State, DOTD*, 96-0145 (La.9/5/96), 680 So.2d 1154, the trial court determined that the DOTD had taken a landowner's property, which he intended to develop as a residential subdivision, when it refused to grant him a driveway permit to allow ingress and egress to and from his property onto Airline Highway. The DOTD denied the permit request because of its imminent plan to build the Interstate 310/ Airline Highway interchange near the proposed subdivision. Even though an

actual physical taking did not occur, the Louisiana Fifth Circuit Court of Appeal previously determined that the substantial impairment of ingress and egress was special and peculiar to the landowner's property and prevented him from developing it; thus, compensation was due. *Rivet v. State, DOTD*, 93-369 (La.App. 5 Cir. 3/16/94), 635 So.2d 295, 298. The trial **50 court also concluded that the three-year prescriptive period in La. R.S. 13:5111 began to run from the date of discovery of the taking--the date the landowners received DOTD's letter informing them that their application for the driveway permit was denied.

In *Naquin v. Dept. of Transportation and Development*, 604 So.2d 62 (La.App. 1 Cir.1992), the plaintiffs had leased two contiguous tracts of land for sugar cane production from separate private landowners. During the existence of the lease, the DOTD purchased a 26.42-acre tract in the leased area from the respective landowners for the purpose of constructing a right-of-way needed to straighten a sharp curve in Louisiana Highway 39. The sellers were compensated for their interests in the land and sugar cane crop then growing on the land. The plaintiffs, having received no compensation, filed suit against the DOTD to recover damages for loss of their crops, leasehold rights, and future gross income resulting from the sale of the 26.42 acre tract. The trial court, finding that the DOTD's actions constituted a taking of the plaintiffs' leasehold interests, awarded them damages and attorney's fees. The First Circuit Court of Appeal upheld the attorney's fee award citing *737La. R.S. 13:5111 as the standard for such an award. *Id.* at 69.

Similarly, in *Huckabay v. Red River Waterway Commission*, 27,113 (La.App. 2 Cir. 10/12/95), 663 So.2d 414, the plaintiffs had leased private property in Red River Parish to use as pastureland in conjunction with their cattle business. Pursuant to the lease, the plaintiffs made improvements to the property, including clearing brush, building fences, fertilizing the land, and planting Bermuda grass. They also repaired the barn, built a

corral, and added a water well and pond to the property. During the lease, the landowners granted a right of entry upon the property to the Red River Waterway Commission ("Commission"), a public body, to conduct exploratory work in connection with a proposed lock and dam to be built on the Red River in the vicinity of the property. Sometime later, after the **51 Commission had done extensive damage to the leased land to the plaintiffs' detriment, in lieu of expropriation, it purchased the property from the landowners for construction of the dam. The plaintiffs then filed suit for compensation for the taking of their leasehold rights and damages for loss profits of the cattle business and loss of use of the improvements they had placed on the land. The Second Circuit Court of Appeal upheld the trial court's finding that the Commission's actions constituted a taking of the plaintiffs' leasehold rights (which they had acquired from the private landowner prior to the landowner's sale of the property to the Commission) and awarded them compensation and attorney's fees pursuant La. R.S. 13:5111. *Id.* at 424.

The Second Circuit upheld another trial court's finding that a taking occurred in *Simmons v. Board of Commissioners of the Bossier Levee District*, 624 So.2d 935 (La.App. 2 Cir.1993). In that case, the plaintiffs owned 17 contiguous residential lots within two adjoining subdivisions located in Bossier City. The plaintiffs' lots fronted Hickory Ridge Drive and were bounded in the rear by Flat River and Benoit Bayou, separate bodies of water that formed a single stream behind the plaintiffs' property. The river and bayou converged about 700 feet from the southernmost line of the plaintiffs' property. The lots sloped gradually toward the water and the rear of each lot was covered with trees that blocked the plaintiffs' view of the opposite bank, secluding the area. The subdivision plats disclosed that the rear boundary of each lot was the centerline of the stream with a 100-foot servitude across the rear of the lots in favor of the levee district. As part of a project to improve drainage in other parts of Bossier City, the Bossier Levee District, under the State's supervision began dredging the river and bayou. Neither the State nor the

levee district took soil samples to determine the characteristics of the soil prior to dredging. Shortly after the dredging commenced, the river's bank began to fail. As a result, the ground near the river cracked and dropped off, **52 leaving large crevices across the rear of the plaintiffs' lots. The number of trees lost ranged from 25 to 150 per lot. In addition, the plaintiffs sustained substantial structural damages to their homes, including cracked slabs, windows, walls, fireplaces, and patios, and damage to other structures such as fences, swimming pools, oxidation ponds, and septic systems. An investigation by the U.S. Department of Agriculture Soil Conservation Service determined the dredging operation caused the stream's bank failure because the soil, called Roebuck or "buckshot" clay, was known to crack and slide when stabilizing pressure was removed from the soil mass during excavation, particularly where the soil was exposed to water.

*738 In a suit against the State and levee district, the State stipulated liability under Article I, § 4 and La. C.C. art. 667 (strict liability for damage to neighboring property.) The levee board stipulated only to article 667 strict liability. The trial court determined that the land and trees actually lost when the canal's banks failed were "taken" in the constitutional sense, awarding the plaintiffs compensation and, pursuant to La. R.S. 13:5111, attorney's fees. In upholding the trial court's conclusion, the Second Circuit reasoned that even though the plaintiffs were not divested of title to their land, they had incurred a substantial interference with the free use and enjoyment of their property. *Id.* at 951.

The plaintiffs in the instant case claim that an appropriation or taking of their property occurred when the State, through the DNR, diverted fresh water by the Caernarvon Freshwater Diversion project from the Mississippi River onto their state-granted oyster leases within Breton Basin. The fresh water, they contend, destroyed their then existing oyster crops and permanently altered the water's salinity levels, rendering their

leases unsuitable for oyster growth. A review of the aforementioned appropriation and taking cases indicates that none is exactly on point with the case before us. Notwithstanding this fact, I, nevertheless, find that **53 plaintiffs' claims do not constitute a taking pursuant to the Louisiana Constitution for several reasons.

In *Simmons,* the extensive physical destruction and permanent loss of the private landowners' land and trees by the levee district precluded the landowners from ever enjoying their property. Also, the appropriating authorities in *Huckabay* and *Naquin* physically invaded, damaged, and used the privately leased properties for public purposes, preventing the lessees from using the land for the purposes set forth in their respective leases.

In the case at bar, however, nothing in the record indicates that the DNR actually invaded or physically disturbed or damaged the water bottoms that were leased by the plaintiffs. It is also significant that the Caernarvon Freshwater Diversion Structure was not constructed on or adjacent to the plaintiffs' leased water bottoms. Although the plaintiffs allege that the freshwater diversion deposited huge amounts of sediment onto their leases, the scientific evidence in the record does not support this claim.

It was uncontroverted that the Caernarvon structure, a "control" structure, was incapable of drawing large pieces of sediment from the Mississippi River. The diversion's flow deposited any sizable pieces of sediment in Big Mar, the sediment trap near the diversion structure. Even though approximately one-half inch of sediment per year had been deposited in testing stations very near the diversion structure, no significant increase in sediment was found in testing stations in the regions of the basin where the oyster leases were located. The "truck loads of sediment," as described by the plaintiffs, were deposited and distributed across

hundreds of thousands of acres of water bottoms. In addition, none of the oyster leases surveyed by either the plaintiffs' or defense experts disclosed any areas of mass buried shells to indicate sediment had covered productive leases.

**54 Moreover, I cannot say that the DNR's actions substantially interfered with the oyster lessees' exclusive use of the leased water bottoms. Unlike in *Rivet,* where the DOTD's refusal to grant a necessary driveway permit to the landowner permanently deprived him of his right to develop his property as a residential subdivision, the DNR's diverting of fresh *739 water into the Breton Basin did not divest the oyster lessees of their right to enjoy the exclusive use of the leased water bottoms. The class representatives testified that they continued to exercise their right to claim damages from oil and gas interests for drilling, surveying, dredging, and other exploration activities conducted on their leases following the diversion, even though the leases were unproductive for oysters. Several of the oyster lessees also filed claims with the federal government for the damages to their oyster leases as result Hurricane Andrew.

The plaintiffs also contend that the fresh water diversion and resultant eurasian water milfoil have rendered their leased water bottoms incapable of supporting oyster populations. The evidence in the record supports the plaintiffs' claims that substantial oyster mortality occurred on their leased oyster beds located within the Caernarvon impact area as a result of the freshwater diversion. The evidence, however, also reflects that oyster production resumed on many private leases when the DNR minimized the diversion flow.

Furthermore, the evidence reflects that the adverse impact of the freshwater diversion in the Breton Basin was not limited to the plaintiffs' oyster leases. It was undisputed at trial that the commercial and recreational fishermen, commercial shrimpers, and coastal property owners, too, were adversely affected by the fresh water. The nutrient laden fresh water fostered vegetation

growth along the entire coastal region in the Breton Basin. The increased vegetation led to an explosion of nutria and other wildlife in the estuary, whose excretions exacerbated the fecal coliform counts, posing a health danger to all wildlife and fisheries in the area. **55 Also, the unrefuted scientific evidence indicates that, in addition to the Caernarvon freshwater diversion, other environmental factors contributed to the growth of eurasian water milfoil, including the amount of rainfall and high temperatures. Much like the damages sustained in *Constance, supra,* the negative effects of the Caernarvon structure's freshwater diversion were not peculiar to the plaintiffs' oyster leases.

While *Huckabay* and *Naquin* both involve the taking of a leasehold interest, they are distinguishable from the instant matter because in those cases the leased properties, which were clearly appropriated (purchased), were owned by a private party other than the appropriating public entity, i.e., the state, a parish, or municipality, or other political subdivision or agency.

In this case, the leasehold rights, which the plaintiffs contend have been appropriated, are the leases of state-owned water bottoms. *See* La. R.S. 9:1101 (quoted *infra).* Because perfect ownership of the water bottoms is vested in the State, the State, by leasing the water bottoms, exercised its right to utilize the usufruct portion of the right of perfect ownership. The naked ownership of the water bottoms, however, was never transferred or assigned to the oyster lessees. During the term of the lease, the State retained the right to do anything it so desired to its naked ownership interest in the water bottoms, but it was responsible for the damages it caused to the leaseholder to the extent that it impaired the leaseholder's right to use the property leased as determined by law and the provisions of the lease agreement.

An oyster lease merely allows the lessee the exclusive use of the water bottom leased. In that regard, the oyster lease is not

materially different from any other lease. It is a synallagmatic contract by which the State gives to another (the lessee) the enjoyment of a thing (a specific *740 area of water bottom, but not the water overlaying the water bottom) for a fixed price. *Cf.*, La. C.C. arts. 2669 and 2670. **56 It can be terminated by the State for the lessee's failure to pay the rent or the failure of the lessee to fulfill the obligations specified in the lease. It grants to the lessee the uncertain hope that he or she will be able to raise a crop of oysters upon the water bottom. But the lessee is not entitled to an abatement of rent if no crop of oysters is produced. *Cf.*, La. C.C. arts. 2743 and 2744. It is for a specific term and can be extended under certain conditions as provided by law.

The term "appropriation," as used in Louisiana, contemplates the permanent or near permanent taking [FN23] of another person's property by the State (or its political subdivision) such that the owner is prohibited from using his property freely as contemplated by La. Const. Art. I, § 4. In other words, the State cannot appropriate or inversely condemn that which it already owns. This interpretation is reinforced by the fact that while both the State (or its political subdivisions) and a private entity, when authorized by law, may expropriate property pursuant to La. Const. Art. I, § 4, only the State (or its political subdivisions) may appropriate property. No constitutional provision, statute, or jurisprudence allows for the appropriation of property by a private entity.

> FN23. A near permanent taking is one in which the taking is for an indefinite period of time, but contemplated at the time of the taking to last in perpetuity.

The State can appropriate the leasehold of a person holding his lease from a *private* person, such as in the *Huckabay* and *Naquin* cases, because the State is permanently taking the leasehold for the remaining term of the lease. Although an oyster lessee holds his lease for a specific term with the first right to extend the lease

for additional periods of time, nevertheless, the State by enacting legislation can terminate that first right effective upon future renewals. In that sense, an oyster lessee does not hold his lease in perpetuity. Therefore, no permanent taking of the plaintiffs' leaseholds occurred.

**57 The State, by creating and operating the Caernarvon structure, did not acquire, expropriate [FN24], or take the water bottoms that it leased to the plaintiffs. Nor did it acquire from the plaintiffs the exclusive use of the leased water bottoms. If anything, the State in this case merely damaged its own property (the water bottoms) and the leaseholds of the plaintiffs.

> FN24. The plaintiffs in the instant case do not allege an expropriation by the State of their leases, although theoretically the State could expropriate the plaintiffs' leases by filing suit and compensating the plaintiffs for their loss; if an expropriation took place, however, the plaintiffs' leases would end. La. C.C. art. 2697.

The evidence before us demonstrates that oyster farming, by its very nature, is highly speculative and subject to a multitude of environmental factors that affect oyster production: for example, the water's salinity level is one; the amount of sediment in the water is another; the weather is a third.

La. R.S. 9:1101 relative to ownership of the waters and beds of bayous, rivers, lagoons, lakes and bays, provides, in part:

> The waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof, not under the direct ownership of any person on August 12, 1910, are declared to be the property of the state. There shall never be any charge assessed against any person for the use of the waters of the state *741 for municipal, industrial, agricultural or domestic purposes.

I note that this statute implies two things material to this case. First, water and water bottoms are two separate and distinct

things. Second, the State cannot charge for water used for agricultural purposes, such as oyster farming.

As previously cited, La. R.S. 56:425 authorized the DWF to lease only state-owned water bottoms and natural reefs on the water bottoms of Louisiana. Because the granting of the plaintiffs' oyster leases did not include the lease of the state-owned *waters* covering the leased water bottoms, the plaintiffs had absolutely no constitutionally protected property interest in the water itself. If the DWF had warranted the condition and/or salinity levels of water covering the water bottoms **58 when it granted the oyster leases, then perhaps that would not be the case. But the DWF made no such guarantee.

After thoroughly reviewing the entire record in this matter, in light of the jurisprudence interpreting the taking of property pursuant to Art. I, § 4 of the Louisiana Constitution and La. R.S. 13:5111, in the absence of evidence to indicate physical damage to, physical destruction of, physical invasion on, or special damage peculiar to the plaintiffs' leased water bottoms by the DNR as a result of the operation of the Caemarvon Freshwater Diversion Structure, I cannot say and do not find that the damages sustained by the plaintiffs to their oyster leases constitute a "taking" or an "appropriation" of property pursuant to Art. I, § 4. Thus, La. R.S. 13:5111 is not applicable to the case at hand.

In view of my conclusion that the plaintiffs' damages as a result of the freshwater diversion are not a compensable taking of property within the meaning of Art. I, § 4, I must now consider whether their delictual claims are prescribed.

Prescription under La. R.S. 56:423 and La. R.S. 9:5624

It is well settled in Louisiana law that when conflicting statutes are applicable, the one more specifically directed to the matter at

issue trumps the more general statute. *Estate of Patout v. City of New Iberia*, 98-0961 (La.7/7/99), 738 So.2d 544, 549.

The one-year general prescriptive period for delictual actions is found in La. C.C. art. 3492. Similarly, La. R.S. 56:423 allows an oyster lessee to bring an action for damages for the wrongful or negligent injury or damage to the beds or grounds under lease by him within one year of the occurrence of the wrongful or negligent act, or within one year of the date of discovery of such act, whichever is **59 later. [FN25] On the other hand, La. R.S. 9:5624, relative to actions for damages to private property for public purposes, provides:

> FN25. Again I note that the statute applies to water bottoms, not to the water overlying the water bottoms.

> When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run after the completion and acceptance of the public works.

The purpose of the statute is to limit the exposure of the State and its political subdivisions to liability in connection with a public work to a reasonable period of time. *Lyman v. Town of Sunset*, 500 So.2d 390 (La.1987). One understands this statute to require a person to assert his or her *742 claim for damages (past and future) caused by a public work within two years of the completion of the public works project and, if not so asserted within that two year period, all claims directly related to that public works project, even if incurred after the two year period, are barred.

Both La. R.S. 56:423 and La. R.S. 9:5624 are more specific to the matter at hand than La. C.C. art. 3492. However, as between La. R.S. 56:423 and La. R.S. 9:5624, La. R.S. 9:5624 is more specific to the issue before us because the plaintiffs assert a claim for damages to their leaseholds as the result of the

operation of a public work (the Caernarvon Freshwater Diversion Structure) rather than a private work or private action, in which case La. R.S. 56:423 would be applicable. [FN26] Here, it is undisputed that the damages sustained by the plaintiffs to their leasehold interests, in addition to the loss of their oyster crops and loss of anticipated income from those oysters, were a necessary consequence of the public **60 work and incurred for a public purpose. The construction and operation of the Caernarvon Freshwater Diversion Structure were mandated by the U.S. Congress and the State of Louisiana for the dual purposes of restoring the State's coast for hurricane and flood protection and enhancing oyster production on the State's public seed grounds.

> FN26. If I were to find that the one-year prescriptive period in La. R.S. 56:423 applicable to this case, then, conceivably, in the future each time the DNR operates Caernarvon to discharge fresh water into the basin which damages the oyster crops and leases, the leaseholders could assert a cause of action against the State for their damages, provided the hold harmless and indemnity clauses in the lease agreements are invalid.

Applying the two-year prescriptive period in La. R.S. 9:5624 to this case, the plaintiffs' claims for damages to their oyster leases have prescribed. The Caernarvon Freshwater Diversion Structure was completed in August 1991 and became operational in September 1991. Thus, pursuant to La. R.S. 9:5624, the plaintiffs would have had to file their claim for damages no later than September 1993, which was two years from the date the project went on-line. The plaintiffs' suit filed on 29 March 1994 was prescribed when filed. Because this conclusion disposes of the plaintiffs' case, I would not address the remaining assignments of error.

Conclusion

In summary, I find that La. R.S. 13:5111 is not applicable to this case. I further find that the plaintiffs are lessees of water bottoms for a fixed term of years, but with the first right to renew their leases. The State is the lessor and owner of the water bottoms, an immovable, which the plaintiffs lease.

Appropriation contemplates the permanent or near permanent taking of a person's property by the State such that the owner is prohibited from using his property freely as contemplated by La. Const. Art. I, § 4. The State cannot appropriate or inversely condemn that which it already owns, i.e., the water bottoms, because it already owns them by virtue of La. R.S. 9:1101. The State can appropriate the leasehold of a person holding his or her lease from a *private* person because the State is permanently taking the leasehold for the remaining term of the ****61** lease. Although the plaintiffs hold their leases for a specific term with the first right to extend the leases for additional periods of time, nevertheless the State can by an enacted law terminate that first right effective upon future renewals. The plaintiffs do not hold their leases in perpetuity. Therefore, no permanent taking of the plaintiffs' leaseholds occurred and no appropriation took place.

***743** During the term of a lease, the State retains the right to do anything it so desires to its naked ownership interest in the water bottom, but is responsible for the damages it causes to the leaseholder to the extent that it impairs the leaseholder's right to use the property leased as determined by law and the provisions of the lease. A claim against the State for damages, such as that contemplated by La. C.C. art. 2315, to a water bottom caused by the State must be asserted within one year under La. R.S. 56:423, or, if applicable, within two years under La. R.S. 9:5624. In the case at bar, the damages, if any, caused by the State to the plaintiffs' leaseholds are article 2315 damages. The plaintiffs' claims had to be asserted within two years from the date that the

Caernarvon Freshwater Diversion Structure became operational; in the case at bar, the period began in September 1991.

Accordingly, for the above reasons, I would reverse the judgment of the trial court and render judgment dismissing the plaintiffs' case.

858 So.2d 697, 2001-0843 (La.App. 4 Cir. 10/15/03)

(2)

Supreme Court, U.S.
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No. 04-1295

In the Supreme Court of the United States

ALBERT J. AVENAL, et al,
Petitioners,

- against -

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

OPPOSITION BRIEF OF RESPONDENTS, THE STATE OF LOUISIANA THROUGH THE LOUISIANA DEPARTMENT OF NATURAL RESOURCES

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QUESTIONS PRESENTED

1. May litigants waive their federal claims in both federal and state appellate courts and then, after all their state claims have been dismissed by a state's highest court, seek to revive their federal claims again in a petition for certiorari to this Court?

2. Where a state's highest court has ruled that Petitioners have no claims under that state's constitution, can Petitioners recharacterize those claims as federal claims in order to gain access to this Court?

3. Should this Court consider a decision from a state's highest court which has been based upon "background principles" of state law?

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STATEMENT OF THE CASE

The Plaintiffs/Petitioners accurately described this state litigation in their opposition brief when last before this Honorable Court on the State's Petition (No. 00-456), as follows:

> "The Plaintiffs/Respondents are a class of oyster leaseholders who instituted this inverse condemnation action in Louisiana State Court against the State of Louisiana, Department of Natural Resources, ("the DNR") under Article I, Section 4 of the 1974 Louisiana Constitution. They allege that the DNR's construction and operation of the Caernarvon freshwater diversion structure effected a "taking" of their oyster leases by diverting freshwater from the Mississippi River into Breton Sound (where their leases are located) and lowering the salinity levels there below that necessary to support oyster cultivation."[1]

---

[1] In their latest filing, i.e., this Petition, Plaintiffs erroneously argue that the State of Louisiana "in an abrupt change of policy" began to operate the Caernarvon Fresh Water Diversion ("Caernarvon") in 1991. (Petition for Certiorari, p. 3.) To the contrary, as recounted at length by the Louisiana Supreme Court in its opinion, the State of Louisiana has been studying coastal restoration in this particular location for decades, began developing the Caernarvon project in the early 1980's, began constructing the Caernarvon structure in approximately 1987, and then began operating the structure in 1991. *Avenal*, 886 So2d 1085, 1088-1092 (La. 2004) (Plaintiffs' Petition for Certiorari App. 7-13 (hereinafter cited as "App.")). Since the well publicized purpose of Caernarvon and other freshwater diversion projects was to change the salinity of the water in coastal Louisiana, the State began inserting an indemnity provision into its oyster leases with oyster fishermen in 1989, which allowed the state to continue to issue oyster leases. By the time suit was filed in this case in 1994, most of the leases in the class area in Breton Sound contained this indemnity clause. As also recounted by the Louisiana Supreme

There is absolutely no mention made in Petitioners' previous description of the case of any federal claims. Indeed, the Petitioners had previously abandoned their federal claims the same year they filed their earlier brief in this Court in No. 00-456.

As to the history of their federal claims, it is true that in 1994 when the Petitioners had filed their original Petition in the state district court they had indeed asserted claims under both the Louisiana Constitution and the Fifth Amendment of the United States Constitution. They had also asserted the same federal claims against the United States in the parallel federal litigation in the Court of Federal Claims. These claims were eventually dismissed by the Federal Circuit because the Petitioners had lacked reasonable investment-backed expectations in their oyster leases. *Avenal v. The United States,* 100 F.3d 933 (Fed. Cir. 1996). The Petitioners chose not to seek further relief with this Court at that time. Thus, the federal judgment that held that they had no federal claims became final.

Subsequently, the DNR filed several dispositive exceptions and motions for summary judgment in the parallel state proceedings. One of those motions sought to establish the preclusive effects of the Federal Circuit's decision *vis a vis*

Court, the oyster fishing industry actively sought these very coastal restoration efforts, which would and did lower salinity in Breton Sound but increased oyster populations in some areas of Breton Sound by as much as 300%! *Avenal*, 886 So2d at 1090, 1112 (App. 54). For Plaintiffs to profess surprise or a change in policy by the State regarding Caernarvon is simply incorrect. Furthermore, the coastal restoration project is restoring the salinity to its historical level, before the advent of accelerating coastal erosion due to the construction of levees along the Mississippi and other rivers, which prevent replenishment of essential nutrients and sediment, and increase salinity, all of which conditions hasten coastal erosion. *Avenal*, 886 So.2d at 1088-1092 (App. 7-13).

Petitioners' claims in the state litigation, which the Trial Court denied. The DNR then sought relief with the Louisiana Fourth Circuit Court of Appeal which initially held that federal law must be applied to "determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction." *Avenal v. State*, 757 So.2d 1, 5 (La.App. 4th Cir. 1999), citing, *Reeder v. Succession Palmer*, 623 So.2d 1268, 1271 (La. 1993). On this basis, the Fourth Circuit Court of Appeal then applied a federal analysis relative to collateral estoppel (or issue preclusion) and dismissed Petitioners' claims "under both the United States and Louisiana Constitutions since the federal judgment precludes relitigation of an issue which a federal court has already decided." 757 So.2d at 8.

The 3-2 split panel disagreed only on the dismissal of the state claims. In his dissent, Appellate Judge James F. McKay stated, "I agree with the majority opinion as it applied to Plaintiffs' *federal* claims," but he "would not grant the summary judgment insofar as it applies to any claims which Plaintiffs may have under *state* law." 757 So.2d at 8, 9 (emphasis added).

Petitioners thereafter petitioned for rehearing but only as to the dismissal of their State law claims, stating that, "it is important to stress that this action seeks compensation pursuant to the Louisiana rather than the Federal Constitution." (Plaintiffs/Respondents' Supplement Brief on Rehearing, p. 1.)

In line with the requested relief, the Fourth Circuit granted their petition for rehearing and reinstated their state law claims. *Avenal v. State*, 757 So.2d at 9 (La.App. 4th Cir. 2000). The Fourth Circuit's decision was based upon its conclusion that federal constitutional law related to the Fifth Amendment differed from Louisiana constitutional law because "the legal standard of what constitutes a taking under the Louisiana Constitution is different." 757 So.2d at 11. The Fourth Circuit

also held that "distinct investment-backed expectations of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978), is [sic] irrelevant to the question of whether a taking has occurred under Louisiana law." 757 So.2d at 13.

The two accompanying opinions further emphasized the fact that only the state law claims survived. The Fourth Circuit's decision partially reinstated the case. First, the sole concurrence likewise analyzed the claims solely under Louisiana law indicating that "prior knowledge of an anticipated expropriation is not a bar to compensation under Louisiana law." 757 So.2d at 13. Likewise, the dissent by Judge Miriam G. Waltzer indicated that the only question that had been addressed was "what is a taking under the Louisiana Constitution." 757 So.2d at 14.

Subsequently, the Louisiana Supreme Court denied the DNR's application for supervisory review. *Avenal v. State*, 2000-1077 (La. 6/23/00), 767 So.2d 41. As was the case with the parallel federal proceeding, Plaintiffs/Petitioners did not seek further appellate relief on the second dismissal of their federal claims with either the Louisiana Supreme Court or this Court. Consequently, the dismissal of the federal claims became a final judgment in the state court system as well.

Meanwhile, DNR then petitioned for certiorari in this Court which was denied. *Louisiana Dep't of Natural Resources v. Avenal*, 531 U.S. 1012, 148 L.Ed. 2d. 486, 121 S.Ct. 568 (2000). Significantly, Petitioners' description of the case within their earlier brief in opposition to DNR's previous Petition to the Court repeatedly indicated that their claims were brought solely under Article I, Section 4 of the 1974 Louisiana Constitution and Louisiana law. See Opposition Brief of Plaintiffs,(then Respondents) No. 00-456, p. 3 ("There is no compelling reason

to grant the DNR's application for a writ of certiorari in this case because the lower Louisiana Court decision turned exclusively on its interpretation and application of Louisiana law."); and, p. 7 ("The issue before the Louisiana Fourth Circuit, therefore was whether a different legal standard applied to the leaseholders' claims under Article I, Section 4 of the 1974 Louisiana Constitution than was applied by the Federal Circuit under the federal constitution.")

When this Court thereafter denied the DNR's Petition for Certiorari (No. 00-456), DNR had exhausted all avenues of interlocutory relief. The matter thereafter proceeded to trial in state district court as a class action on the state constitutional claims alone. The Petitioners submitted proposed jury charges which only sought compensation under Article 1, Section 4 of the Louisiana Constitution of 1974. (See Petitioners' Proposed Jury Charges.) The Trial Court thereafter adopted the Petitioners' proposed jury charges in its jury instructions. (See Trial Court's Jury Instructions.) The jury determined that a taking had occurred under state law and awarded the Plaintiffs/Petitioners $21,345 per acre for oyster leases for which the annual rent is only $2.00 per acre, resulting in a judgment to the class of approximately $1.3 *billion*, perhaps the largest in the history of takings law in the United States. The Trial Court entered judgment solely on the basis of Article I, Section 4 of the Louisiana Constitution of 1974. (See January 10, 2001 Judgment).

DNR appealed to the Fourth Circuit which affirmed (3-2) for the most part, only to add additional money to lead Plaintiff, Albert Avenel. One dissenting appellate judge indicated that the damages "shock the conscience." *Avenal v. State*, 858 So.2d 697, 708 (La.App. 4th Cir. 11/21/03) (Love, J. dissenting)(App. 86). The DNR then applied for writs of certiorari and review as

well as supervisory writs to the Louisiana Supreme Court. The writs were granted.

In its thirty-five page opinion, the Louisiana Supreme Court ruled that nearly all of the claims of the Plaintiffs/Petitioners, should be dismissed because their oyster lease forms contained the contractual indemnity clause in favor of the State. The Louisiana Supreme Court held that these clauses were justified by state law, i.e., "the oyster statutes" (La. R.S. 56:3 *et seq.*), Louisiana contractual law of indemnity, and, Art. IX, Sec. 1 of the Louisiana Constitution. *Avenal*, 886 So.2d at 1098-1099, 1102-1103, 1100-1110 (La. 2004) (App. 24-30, 34-38, 48-51). As to the remaining claims for twelve of the Plaintiffs' leases which did not have indemnity clauses, the Louisiana Supreme Court held that these were prescribed or time-barred based upon the applicable prescriptive period under Louisiana Civil Law. *Avenal,* 886 So.2d at 1109-1110 (App. 51). While the Louisiana Supreme Court specifically referred to Art. I, Sec. 4 of the Louisiana Constitution as the basis for Petitioners' claims in both its preamble and conclusion, the Fifth Amendment of the United States Constitution was discussed in only one footnote, 886 So.2d at 1107-1108, n.28 (App. 45-47). Therefore, the Fifth Amendment could have had little, if any, bearing on the Louisiana Supreme Court's decision. Yet, Petitioners now seek a writ of certiorari based upon this one footnote.

ARGUMENT

I. THE PETITIONERS WAIVED FURTHER APPELLATE REVIEW OF ANY FEDERAL CLAIMS WHICH HAD ALL BEEN DISMISSED BY BOTH FEDERAL AND STATE APPELLATE COURTS.

This Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision sought to be reviewed. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). A federal claim must be presented with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 88 (1997). Review must be denied to a petitioner who fails to properly present a federal question to the highest state court. *Parker v. Illinois*, 333 U.S. 571 (1948).

The record is clear that the Petitioners intended to forego their takings claims under the federal Fifth Amendment so as to pursue their claims only under the Louisiana Constitution. As a result, the Louisiana Supreme Court's opinion issued in this matter was based entirely on Article I, Section 4 of the Louisiana Constitution of 1974. The Plaintiffs' earlier federal claims were discussed in detail in a lone footnote of a thirty-five page opinion, rendering the Court's comments on the federal claims dicta at best. Indeed, in treating Petitioners' claims as including claims under the federal constitution, the Louisiana Supreme Court went outside the scope of the case actually before it.

More specifically, as far back as 1999, the Petitioners had specifically disclaimed any rights under the Fifth Amendment, pointing out to the Louisiana Fourth Circuit Court of Appeal that "[I]t is important to stress that this action seeks compensation pursuant to the Louisiana rather than the federal constitution." (Plaintiffs/Respondents' Supplemental Brief on Rehearing, p. 1.)

This was an acknowledgment by the Petitioners that they were estopped from pursuing a claim under the Fifth Amendment because those same claims had been dismissed by the Federal Circuit in *Avenal v. United States,* 100 F.3d 933 (Fed. Cir. 1996), from which they had sought no relief. In 1999, the Louisiana Fourth Circuit Court of Appeals had also dismissed the Petitioners' federal claims. *Avenal v. State*, 99-0127 (La. App. 4th Cir. 03/03/99), 757 So.2d 1, 8. In the lone dissenting opinion, which would form the majority opinion on rehearing, appellate judge James McKay agreed that the federal claims must be dismissed, *Id.* On rehearing, Judge McKay authored the opinion which only reinstated the Petitioners' claims under the Louisiana Constitution. *Avenal v. State*, 99-0127 (La. App. 4th Cir. 03/03/99), 757 So.2d 9, 11.

Contrary to the assertions in their Petition, the Petitioners did *not* appeal this judgment insofar as any claims under the Fifth Amendment were concerned. (See Petitioners' Brief of Appellant to Fourth Circuit, Petitioners' Brief of Appellee to Fourth Circuit and Petitioners' Original Brief to the Supreme Court of Louisiana.) In fact, in their brief filed in opposition to the State's earlier Petition for Certiorari to this Court, the Plaintiffs previously stated "the DNR's Petition for a Writ of Certiorari should be denied because it seeks review of a state appellate court decision applying well-settled principles of state law," not federal. (Opposition Brief, No. 00-456, p. 4.)

Under Louisiana procedural law, the Petitioners waived whatever federal claims they might have had by failing to seek further appellate relief below. This is because it is well settled under Louisiana law that when a judgment is silent to a demand at issue under the pleadings, such silence constitutes absolute rejection of the demand. *Succession of Foster*, 122 So.2d 96, 98 (La. 1960). Consequently, the Petitioners were prohibited from seeking to enlarge their rights under the Trial Court's decree for

the first time on an application for a writ of certiorari to the Louisiana Supreme Court had they attempted to do so. *Logan v. Louisiana Dock Co., Inc.*, 541 So.2d 182, 192 (La. 1989). Likewise, the Petitioners are prohibited from attempting to do so now under federal law. *U.S. v. American Railway Express Co.*, 265 U.S. 425 (1924).

A review of the proceedings below, clearly show that Petitioners intentionally abandoned their federal claims. Both of the Louisiana appellate courts which reviewed the Trial Court's Judgment analyzed the Petitioners' claims solely under Article I, Section 4 of the Louisiana Constitution of 1974, not the Fifth Amendment. The Louisiana Fourth Circuit's opinion makes clear that, in accordance with the Trial Court's Judgment, the Petitioners were only awarded damages under Article I, Section 4 of the Louisiana Constitution of 1974. *Avenal v. State of Louisiana,* 2001-08843 (La. App. 4th Cir. 10/15/03) 858 So.2d 697, 702 (App. 75-76). Indeed, there is no mention whatsoever of an award by the Trial Court under the Fifth Amendment or any other federal theory.

Moreover, the Louisiana Supreme Court states that it granted DNR's writ application to determine if the Petitioners were entitled to compensation under Article I, Section 4 of the Louisiana Constitution of 1974, not the federal Fifth Amendment. *Avenal*, 886 So.2d at 1095 (App. 20). The holding of the Louisiana Supreme Court is that the Petitioners were not entitled to compensation under Article I, Section 4 of the Louisiana Constitution of 1974. *Avenal*, 886 So.2d at 1088, 1109-1110 (App. 6-7, 51). Accordingly, the Louisiana Supreme Court decided this issue under Louisiana, not federal, law.

The Petitioners' entire basis for asserting federal question jurisdiction lies in footnote 28 of the Louisiana Supreme Court's opinion, wherein the Court noted that the Petitioners asserted

(although did not adjudicate) a claim under the Fifth Amendment. *Avenal*, 886 So.2d at 1107-1108 (App. 45-47). As this issue was neither adjudicated in the Trial Court nor appealed by the Petitioners, the Louisiana Supreme Court's analysis is *obiter dicta*, i.e., statements by the Court that are "unnecessary to the decision in the case, and therefore not precedential though [they] may be considered persuasive." *Co-Steel Raritan, Inc. v. International Trade Commission*, 357 F.3d 1294, 1307 (Fed. Cir. 2004). Dictum includes any statement of law by a court "merely by way of illustration, argument, analogy, or suggestion." *Co-Steel, supra*.

It is also plainly evident that the Court's treatment of the Petitioners' Fifth Amendment claim was hypothetical. For example, the Court comments that "if Caernarvon did entirely deprive them of all economically beneficial and productive use of their property rights, the plaintiffs are still not entitled to compensation" under federal law. *Avenal*, 886 So.2d at 1107 (App. 46). Yet the Court, just one page earlier, held that Caernarvon did not, in fact, deprive the Petitioners of all economically beneficial and productive use of their property rights because the evidence revealed that some of their leases were still producing oysters, they continued to exercise their right to claim damage to their leases from oil and gas exploration activities conducted on their leases, and, had filed damage claims with the federal government as a result of Hurricane Andrew. *Avenal*, 886 So.2d at 1107 (App. 44).

Furthermore, footnote 28 stresses that "even analogizing the operation of Caernarvon to a regulatory taking" the Petitioners would not be entitled to compensation under federal law. *Avenal*, 886 So.2d at 1108 (App. 46). Similarly, Justice Weimer's concurring opinion discusses federal takings law as a "comparison" to the property rights guaranteed under the

Louisiana Constitution. *Avenal*, 886 So.2d at 1112-1114 (App. 57-59).

It is clear that the Petitioners did not properly present a Fifth Amendment claim in state court. No Fifth Amendment claim was properly before the Louisiana Supreme Court and none was decided. The only Fifth Amendment claims the Petitioners ever properly presented had been dismissed by the Federal Circuit nine years ago, and the Louisiana Fourth Circuit six years ago, and the Plaintiffs abandoned all further federal efforts until now. The only issue before the Louisiana Supreme Court was whether there was a taking under Article I, Section 4 of the Louisiana Constitution of 1974. The Petitioners were content to rely on the Trial Court's award of damages under Article I, Section 4 of the Louisiana Constitution. This issue was decided purely on the basis of state law. There is no federal question for this Court to review. The Petitioners cannot attempt to amend the Trial Court's Judgment now to include such a claim for the first time in their Petition to this Court. Accordingly, the Petition must be denied on jurisdictional and/or procedural grounds.

II. FURTHER APPELLATE REVIEW OF THIS MATTER IS NOT WARRANTED BECAUSE THE STATE'S HIGHEST COURT DECIDED THE CASE BASED UPON LOUISIANA LAW INCLUDING THE CIVIL LAW CONCEPT OF PRESCRIPTION.

When a state-court decision is clearly based on independent state law that is both adequate and independent, this Court will not review the decision. *Illinois v. Rodriguez*, 497 U.S. 177, 182 (U.S., 1990), citing, *Michigan v. Long*, 463 U.S. 1032, 1041, 77 L.Ed. 2d 1201, 103 S.Ct. 3469 (1983). The mere reference to, or mention of federal issues in the State Court opinion does not change this analysis. *Uhler v. AFL-CIO*, 468

U.S. 1310 (1984); *Montanans for Balanced Federal Budget Committee v. Harper*, 469 U.S. 1301 (1984). As the Louisiana Supreme Court made clear, its decision was based entirely upon state law:

> "After review of the record and the applicable law, we reverse the judgments of the lower courts and hold that the vast majority of the oyster fisherman are not entitled to compensation under La. Const. Art. I Section 4 because their leases contain clauses holding the State harmless from any loss or damage resulting from this coastal diversion project. Further, we hold that the claims of the oyster fisherman whose leases do not contain hold harmless clauses have prescribed under La.R.S. 9:5624." *Avenal v. State*, 886 So.2d at 1088 (App. 7).

There is absolutely no mention in this holding of federal constitutional law or the Fifth Amendment of the United States Constitution, simply because the Louisiana Supreme Court did not rely upon those sources of law to reach its decision. The Petitioners' theory is based solely upon one footnote in a thirty-five page unanimous decision from the State's highest court and a ten page concurring opinion, all of which Petitioners simply fail to mention. The issue is then whether the Petitioners can create a federal case out of that one footnote. Particularly note worthy is the fact that Petitioners' present contention that this case somehow presents, or is based upon, an entirely federal issue is completely contrary to their earlier position that this case consists entirely of state law issues when this same matter was previously before this Court on a Petition for Certiorari in No. 00-456.

As to what law the Louisiana Supreme Court did address and rely upon in its opinion, that Court had upheld the indemnity

clause in favor of the State because it was consistent and appropriate under the Louisiana "oyster statutes" which define the limited property interest held by the Plaintiffs/Petitioners. *Avenal*, 886 So.2d at 1095-1096, citing, La.R.S. 56:3 *et seq.* (App. 20-22). The Court also pointed out that the clause was consistent with other provisions of the Louisiana Constitution including Article VII, Section 14 and Article IX, Section 3, which prohibited the State from alienating its own water bottoms and tendering title to the Petitioners. *Id.* Finally, the Court held that the clause was perfectly consistent with the state's police power and the public trust doctrine embodied in Article IX, Section 1 of the Louisiana Constitution. *Avenal,* 886 So.2d at 1101-1102 (App. 33-35).

Thus, the Louisiana Supreme Court defined the limited nature of Petitioners' property rights under, and subject to, "background principles" of applicable Louisiana law in line with this Court's jurisprudence, recognizing "the restrictions that background principles of the state's law on property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). These included relevant Articles of the Louisiana Constitution, the Louisiana "oyster statutes" and the lease form itself including its indemnity clause, all purely Louisiana sources of law which define the limited property interest Plaintiff/Plaintiffs hold. As to the remainder of the claims, the civil law concept of prescription rendered the twelve remaining claims of the Plaintiffs/Petitioners time-barred under La. R.S. 9:5624. *Avenal,* 886 So.2d at 1109-1110 (App. 51). Consequently, even this last issue was decided solely under Louisiana state law. Consequently, this entire case was decided below solely upon the Louisiana Supreme Court's construction of Louisiana law and there is no reason for this Court to review the decision below.

III. THE PETITIONERS PRESENT NO REASON FOR THIS COURT TO REVISIT THE DISTINCTION BETWEEN REGULATORY AND PHYSICAL TAKINGS.

The Louisiana Supreme Court decided this case based upon the limited nature of Petitioners' property interest, (i.e., what was "not part of their title to begin with," *Lucas*, 503 U.S. at 1026-27) by applying "background principles" of Louisiana property law. In defining Petitioners' property interest, the Louisiana Supreme Court noted that no court in Louisiana had ever concluded that the Louisiana "oyster statutes" had given Petitioners a right to sue the state for damages to oyster leases resulting from coastal restoration projects. *Avenal*, 886 So.2d at 1100 n.20 (App. 32). The Court also made it clear that under Louisiana law, the Petitioners have no right to the remedy they sought, i.e., the right to recover the "exorbitant amount of damages" for the cost of "restoring" the state's own water bottoms. *Avenal*, 886 So.2d at 1094, n.10 (App. 19).

In addition to pointing out what property rights and obligations the Petitioners did *not* have, that Court also held that Petitioners had contractually obligated themselves to indemnify the State for any such damages as a "compromise" for the lease itself, *Avenal*, 886 So.2d at 1096 (App. 23), an obligation that was consistent with both the state's police power and the public trust doctrine under the Louisiana Constitution. *Avenal*, 886 So.2d at 1101-1102, 1108 (App. 34, 46-47). Finally, that Court held that there was no formal acquisition of Petitioners' property interest by the state since Petitioners still have their oyster leases, and are still making claims against third parties and the federal government related to those leases. All of these conclusions are based solely upon interpretations of Louisiana law in fact, background principles of Louisiana law related to property, contracts and the state's constitution.

Even if the case did present a federal constitutional issue (which it does not), neither of the issues set out by Petitioners would warrant granting a writ of certiorari. This Court recently explored at length the distinction between government limitations on the use of property and physical occupations, (see *Tahoe-Sierra*, 535 U.S. at 323-325) and Petitioners have identified no good reason for the Court to revisit the issue in this case, especially since the State in no sense "took possession" of any property belonging to Petitioners. Furthermore, the conclusion that Petitioners lacked a sufficient property right to support their takings claims is amply supported by this Court's precedents, including the government's recognized power to forestall "grave threats to the lives and property of others." *Lucas*, 505 U.S. at 1029, n.16. The state's rapidly disappearing coast presents such a threat.

CONCLUSION

Simply put, the Plaintiffs/Petitioners ask this Court to review an interpretation of Louisiana law by the Louisiana Supreme Court, Louisiana's highest court. Under Rule 10 of this Court, there is no compelling reason for granting certiorari and the Petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 2004

ALBERT J. AVENAL, JR., et al.,
Petitioners,

– against –

THE STATE OF LOUISIANA and
THE DEPARTMENT OF NATURAL RESOURCES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This reply is respectfully submitted to the opposition of the State of Louisiana and The Department of Natural Resources (together, the "State") to the petition for certiorari. Notably, the State does not present any real opposition to the substantive claims raised by petitioners; it simply does not address petitioners' claims as to the tensions and confusion that characterize the many strands of this Court's takings jurisprudence and the need for clarification and resolution.

I. THE FEDERAL CONSTITUTIONAL QUESTION WAS RULED UPON BY THE LOUISIANA SUPREME COURT, AND THERE IS NO BAR TO THIS COURT'S REVIEW OF PETITIONERS' CLAIMS

The State's primary opposition to this petition for certiorari rests on its assertion that this Court should not consider petitioners' federal constitutional takings claim because petitioners, according to the State, intentionally waived it in earlier proceedings. The State is incorrect.

To make its point, the State indulges in a lengthy recitation of this matter's procedural history, nearly all of which is irrelevant because, as the State ultimately recognizes, this Court's jurisdiction is appropriate where a federal constitutional claim was addressed by a state's highest court. Here, there is no question that the Louisiana Supreme Court addressed and ruled on petitioners' federal constitutional claims; that court's opinion speaks for itself:

> Plaintiffs have also asserted a claim under the Fifth Amendment of the U.S. Constitution, which provides that "private property [shall not] be taken for public use,

> without just compensation." U.S. Constitution Amendment V; see also Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 307 n.1, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

A. 45. After engaging in extensive analysis of that federal takings claim, the court denied it. A. 45-47. Thus, the simple fact remains – uncontradicted by the record – that Louisiana's highest state court recognized and ruled on petitioners' federal claim, notwithstanding the State's attempt to smother it in layers of complex procedural history.

Moreover, to the extent that the State now asserts that the Louisiana Supreme Court only addressed the federal claim in error, we disagree. The State argues that a 1999 decision of Louisiana's intermediate Fourth Circuit appellate court had the effect of dismissing petitioners' federal claims.

That is, in 1999, after the federal Court of Claims, in a separate proceeding, granted summary judgment on a Fifth Amendment taking claim that petitioners raised there, the State subsequently moved for summary judgment in the state court action, claiming that collateral estoppel barred the re-litigation of issues decided by the federal judgment. The state trial court denied summary judgment, and the State appealed. The Court of Appeal of Louisiana, Fourth Circuit, denied the writ following rehearing and affirmed the judgment of the trial court. Avenal v. State, 757 So.2d 1, 9 (La.App. 4th Cir. 3/15/00)(McKay, J.)[1]

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[1] Initially, a split Fourth Circuit reversed, see Avenal v. State, 757 So.2d 1 (La.App. 4th Cir. 3/3/99) but the decision following rehearing – penned by the dissenting Judge – reached the opposite conclusion.

The State now asserts that the Fourth Circuit's decision permitted only state law claims to survive when the Fourth Circuit sent it back to the trial court for trial (Opposition Brief at pp. 2-4), but that opinion does not reflect such a limitation. To the contrary, the Fourth Circuit based its analysis on the fact that Louisiana law "does not recognize the doctrine of collateral estoppel," 757 So.2d at 11, and that, accordingly, there could be no issue preclusion:

> Since there has been no prior suit between the leaseholders and the Department of Natural Resources, even if collateral estoppel existed in Louisiana law, it is inapplicable by its own terms.

Id. Even if the State were correct that the Fourth Circuit had intended to dismiss the federal claims, the Louisiana Supreme Court was not bound by that lower court decision, as a collateral estoppel ruling by its own intermediate court probably could not, and here certainly did not, bar the Supreme Court of Louisiana from addressing the issue.

In sum, the State's claim of waiver, itself belatedly raised at this juncture,[2] is factually inaccurate, and, accordingly, its proposed bar to this Court's review is unsupportable on the record below. As set forth in the Petition, and hardly contested by the State, the Louisiana Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court, and this Court should grant review to resolve that question.

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[2] The State did not assert waiver in its opposition to petitioners' motion for rehearing in the Louisiana Supreme Court, which addressed the issue presented herein.

II. THE STATE'S ARGUMENT THAT CERTIORARI SHOULD BE DENIED BECAUSE THE LOUISIANA STATE COURT STATED A SEPARATE AND INDEPENDENT STATE LAW GROUND, BASED ON AN EXPANSIVE READING OF ITS POLICE POWERS AND BACKGROUND PRINCIPLES OF STATE LAW, DEMONSTRATES WHY CERTIORARI SHOULD BE GRANTED

Petitioners raised a second claim: that a state may not expand its reading of its own police powers or its "background principles" of property and nuisance law in order to eliminate exposure to valid federal takings claims. By framing its opposition in the context of Louisiana's law of prescription, the State underscores the fallacy of its own argument.

According to the State in its Opposition Brief at Point II, this Court should deny review because the Louisiana Supreme Court concluded, inter alia, that the oyster fishermen were not entitled to compensation because the State's action did not violate the takings clause of Louisiana's own state constitution. Because the case was decided "upon the Louisiana Supreme Court's construction of Louisiana law," the State reasons, there is no need for further review.

However, the State's logic is backwards: it is precisely because Louisiana's Supreme Court held that the state constitution provides narrower protection from takings than does the federal constitution that the State may not rely on an overly-expansive reading of its own "background principles" of property law to circumvent compliance with the broader Fifth Amendment requirements. That is, Louisiana may not deprive its citizens of federal constitutional protections, where they are broader than the guarantees of the state's constitution, by simply reading its own powers and "background principles" more expansively.

As set forth in petitioners'. Petition, the Louisiana Supreme Court incorrectly read the Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) exceptions stemming from a state's "background principles of state law of property and nuisance" and its police power; the State's argument now that Louisiana's civil law concept of prescription permits it to circumvent compliance with basic federal constitutional requirements may not be countenanced.

Certiorari should thus be granted to address whether, as the Louisiana Supreme Court has held, a State can expansively read its "police power" or its "background principles of the State law of property and nuisance" so as to eviscerate the Fifth Amendment's Just Compensation requirements.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT OVER HOW TO ASSESS THE DESTRUCTION OF THE VALUE OF PROPERTY HELD UNDER A LEASE UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT

The State offers little considered opposition to petitioner's substantive claims, simply concluding without any basis that petitioners leaseholds do not constitute a valid property interest, and then referring, without explanation or analysis, to this Court's decision in Tahoe-Sierra Preserv. v. Tahoe Reg. Planning, 535 U.S. 302 (2002) as somehow dispositive of the Fifth Amendment takings question presented here.

Of course, Tahoe endorsed the idea, long part of this Court's takings jurisprudence, of a lease as compensable property. 535 U.S. 302 at 322. However, the regulation imposing a temporary moratorium at issue in Tahoe did not, as the State suggests, dispose of the issue raised in petitioners' application for certiorari: whether the State's destruction of the economic value of a leasehold property interest should be

analyzed under a physical takings treatment or a regulatory takings analysis or a third hybrid of the two.

The State simply does not address petitioners' claims of confusion resulting from the various overlapping lines of analysis which have developed within this Court's takings jurisprudence, and which have caused significant disparities in treatment of parties whose property has been taken. In fact, the profound lack of clarity is most evident in the State's closing statement, which simultaneously conflates the standards employed in analysis of a nuisance claim, a physical takings claim, and a regulatory claim when it argues: "[T]he conclusion that Petitioners lacked a sufficient property right to support their takings claims is amply supported by this Court's precedents, including the government's recognized power to forestall 'grave threats to the lives and property of others.' Lucas, 505 U.S. at 1029, n.16." (Opposition Brief at 15)

This case presents issues that are arising frequently in land-use and compensation disputes across the country, and therefore this Court should grant certiorari to address the question of how leasehold property holdings should be treated when they are taken by State action.

CONCLUSION

This Petition raises important constitutional issues about which the law is in conflict. The Petition for a Writ of Certiorari should be granted.

April 29, 2005

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